

CABLE RAILWAYS vs. HORSE RAILROADS

FOR INTRAMURAL TRANSIT

IN THE

CITY OF NEW YORK.

CONCLUDING ARGUMENT

BY

CHARLES P. SHAW, Esq.,

IN SUPPORT OF CABLE RAILWAYS, BEFORE THE COMMISSIONERS
OF THE SUPREME COURT—GENERAL TERM.

HON. GUY R. PELTON,
HON. W. C. TRAPHAGEN, } *Commissioners.*
HON. LEROY B. CRANE, }

MR. CHARLES P. SHAW,

For the New York Cable Railway Company.

MESSRS. FREDERIC R. COUDERT,	THOMAS P. WICKES,
WILLIAM C. TRULL,	CHARLES PUTZEL,
HON. ALFRED WAGSTAFF,	DWIGHT COLLIER,
HON. LUKE M. COZANS,	F. W. ADEE,
CLIFFORD A. HAND,	C. W. SEYMOUR,
JOHN M. SCRIBNER,	VALENTINE MARSH,
JOSEPH ECCLESINE,	EDWARD LAUTERBACH,
HON. ABRAM WAKEMAN,	WHEELER H. PECKHAM,
HON. JAMES M. VARNUM,	

For Fifteen Horse Railroads and for other objectors.

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MAY IT PLEASE THIS HONORABLE COMMISSION :

The magnitude of the inquiry that has so long been before you, its far reaching effect upon the mental, the moral and the material interests of the people of this great metropolis, for whom you are really practically legislating on a matter of the gravest concern to them, deserves at my hands a swelling prologue as to an imperial theme; but I shall not indulge in any prologue except by quotation from Lord Macaulay's History of England, where he says "*of all inventions, the alphabet and the printing press alone excepted, those inventions which abridge distance have done the most for the civilization of our species. Every improvement of the means of locomotion benefits mankind morally and intellectually as well as materially.*"

That proposition is not only true respecting means of communication between city and city, state and state, and across continents from sea to sea, but it is also more intensely true as to furnishing means of communication *within* the metropolis where the ganglia of human life and thought and enterprise are clustered.

And thus it is that Mr. Holmes, the President of the Chicago Cable Road, in his affidavit says, "since this improvement in means of locomotion has been adopted in Chicago, we find that our car conductors have become superior men, mentally and morally."

Compare a car conductor on the elevated railroads of this city with a car conductor on a horse railroad. Behold how one is clothed as it were, with a sort of official dignity and importance. Look at the uninviting appearance of the other. That illustrates the situation as to the difference between employees who conduct the traffic of our city. But what is the effect upon the health and manners and morals of the passengers? All of you have visited London where the cab system prevails. Would you there take a shabby

hansom? No; You demand the brightest and cleanest. If, as so frequently is the case *here*, you get, by accident or necessity, into a nasty and broken down cab you don't put your head out of the door, you don't want to see any passers-by, you hide yourself. But give you a stylish vehicle and you appreciate your own dignity and you assert your sense of your own personal worthiness by a complacent, self-possessed and exposed glance at every passer-by.

This may seem to be a trivial matter, but if our whole city, including its rich and poor, could be lifted up to an appreciation of a system of intramural transit, which would be the common right of all, and which would furnish means of transit, at once elegant, commodious, adequate, cheap, noiseless, cleanly and every way pleasant, and at the same time so comprehensive and adaptative as to carry for a single fare of five cents *up* town and *down* town, on *both sides* of the city, and *across* the city at convenient intervals, so as to connect with all our established ferries upon the two glorious rivers that cincture our metropolitan island, in commodious and elegant cars, propelled by the noiseless and perfectly subjected power of steam, exerting its energy from an unseen and distant station, under this mysterious cable railway grip which, like the human hand, plays, if I may use the expression, the symphony of locomotion—and all this without the *noisome* products of combustion and the *noise* incident to the lumbering, vibratory energy of the locomotive, and without the *faeculent* voidings incident to the use of animal power, the perils of which to the health of the city have been so powerfully and graphically described before you by PROFESSOR DOREMUS and other sanitary authorities.—I say, if all this be so, what power for weal or woe to this city is held in your hands, gentlemen of the Commission.

I cannot allow you to think that I exaggerate this matter. Several years ago I heard the late eloquent Dr. Chapin deliver his lecture on "THE ORIGIN OF SOCIAL FORCES." I remember, in a general way, that he ascribed their origin, so far as concerned classic Rome, to a sunbeam that melted frozen water on the pinnacles of the Alps. It was a small effort of the sunbeams, he argued, upon each Alpine crystal of frost-woven water, but

crystal after crystal of the icy diamonds melted and united their products into the cataract that leaped from their mountain-home, now in cascade, now in torrent, and finally reached the glowing Lombard champaign, on whose smiling bosom flow the Po and the Tiber. Thus, from a sunbeam kissing his frosty mistress of the ice, came the majestic river whose yellow tide made the majesty of Rome and lent buoyancy to the boat that bore Caesar and his sceptre of universal empire.

Brought by this illustration of a sunbeam's power into the presence of imperial Rome, its tribunes, its consuls, its conscript fathers, I present to you this proud question, and you must answer it, not to coming generations, but to the living, throbbing throng of to-day. It was the great Roman question. That question is this: What have you done to adorn the capital of your country? If this cable system of railways, with its transfer tickets, will cheapen, enhance, perfect a system of intramural transit for our city, you cannot deny if you refuse it, that *you found it within your power to promote its prevalence.*" If the system prevails by your approval—and it can prevail only by your approval—you, when asked, as the Roman official was accustomed to be asked, "What have you done to adorn the capital of your country?" may answer, "We have aided to give a system of intramural transit, vast and comprehensive, for the benefit of the rich and poor of the metropolis and the stranger within its gates, and which we verily believe, with Lord Macaulay, will 'benefit mankind morally and intellectually, as well as materially.'"

I just spoke of this cable railway grip. Without it, all that I for five long months have contended for before you would be a vain folly. With it, we are made to conceive how the grasp of the iron but flexible fingers of a metallic hand can work the chords of the harp of human progress in this matter of intramural transit, as perfectly as Orpheus could have done it.

The advent of this grip, as a practical realization, seems to have been a providential marvel to our city, appearing at the time and under the circumstances that it did. Its efficiency and perfection had received the test of ten years' practical operation in the City of San Francisco; five years in Melbourne Australia,

and three years in Chicago; cities illustrating all the topographical peculiarities of our metropolis, and also all variations in the *width*, business and activity of its thoroughfares. The Constitutional Amendment of 1875, forbade the further construction of horse surface railroads, until the Legislature should declare by some general act that additional roads of that description might be built. Up to May 6, 1884, no such act had been passed, although the horse-railroad franchise hunters had besieged the Legislature annually and frantically for eight previous years with their venal appliances and their greedy love of plunder. But there was on the statute-book, and has been on the statute-book in unimpaired vigor ever since June 18, 1875, an act known as the Rapid Transit Act, under which our elevated railroads have been built, and under which surface roads of the cable description or any other description, *except roads to be operated by animal power, could and can be built.*

During these eight years of struggle to plant more horse railroads in this city, the need of additional and improved transit had grown and grown until it had exceeded the enormous proportions described by Mr. Bergh, General Viele, Mr. Shinn, Mr. Church, Mr. Fuller and others, whose testimony is before you.

During these eight years the city's need for additional transit had astonishingly multiplied. Our sister city of Brooklyn had almost doubled her population, and the other cities and villages within the radius of our municipal activity grew like Jonah's gourd. Of course, under such a condition of things as this, no one knew when the oft besieged and oft resisting Legislature would offer further facilities. It was at this time when the necessity, as all admit, for increased transit facilities existed, and when there was no power to obtain them, except under the Rapid Transit Act of 1875, that this wonderful cable railway grip, so successful in sister cities, was presented to the attention of the constituted authorities, charged with the duty of dealing with this question.

The symphony of the Tenth Muse—the Muse of Invention—brought that cable railway grip to us.

A word here as to the practical operation of the system. It is general Viele's system. There is to be no disguise about that, I hold his testimony in my hand. From it I read. He says:

“ So far as this system is concerned, I can give a detailed statement of it ; I insert below in this affidavit an extract from a newspaper, giving a description of the condition of things in the City of Chicago, where the cable system is a fact, and not an experiment, but a fact as fixed as the existence of the horse or mule motive power of the horse-railway system ; the article describes the condition in the City of Chicago at this moment, and I know it is correct, because I have observed the fact stated in it.

The article is as follows :

CHICAGO CITY RAILROAD COMPANY.

(From Chicago Inter-Ocean, January 1, 1885.)

Of all the new methods for shortening time and space in great cities the most perfect hitherto is that of the cable-car system. If one horse can supply the place of a dozen, and still more, if a stationary engine two miles away can eliminate horses almost entirely, and furnish more and more rapid accommodation, the gain directly in comfort and indirectly in the spread of the population is incalculable. That the cable system presents the highest degree of excellence yet attained for city travel needs no demonstration. A short experience was necessary to habituate the public to the cable-cars. But, now that we are all familiar with them, every one knows precisely how to deal with them. The Cable Company have done a work that thinking people will not fail to recognize. Abused and vilified as all good things are, denounced as every step of progress has been, every man, woman and child in Chicago now points to the cable-cars as one of the most valuable and progressive enterprises of Chicago. The citizen enjoys a quiet chuckle as he does homage to his own superior knowledge at the expense of the mystified looks and questions of his country cousin. We all feel ourselves on a higher plane of intelligence from our being part of the city with its cable railroad, as well as the other institutions that constitute the pride of Chicago. No wonder this system has been a great success. Over 100 grip-cars and more than 300 box-cars constantly passing, always occupied, and in the morning and evenings crowded, an army of workmen, and a finance system away up in the millions, present the idea of great public usefulness. There is not one man of us who would not be proud to own a slice, notwithstanding all the detraction of the ‘early days.’ It is well known not only that the cable road has immensely increased the value of all real property along the route, but everywhere within convenient access of that route. The extension of the same system through those portions of our chief thoroughfares, not yet occupied, would be hailed with delight by every man owning a fifty-foot lot.

No man can contend that the Cable Company has not provided locomotion good, cheap and effective. They deserve their success. The rate of speed is far greater than that attained from a motive power of horses, while the condi-

tion of the track is infinitely superior. The cable-car system constitutes the finest method of locomotion ever introduced here or elsewhere. A description of the system is hardly needed. The cable is of iron wire and runs on pulleys through a long tunnel under the centre of the street. The grip-car is provided with a long, strong, combined lever that grips the cable by means of a jaw under the cable and sustaining it and another jaw that is drawn down and presses the cable between itself and the lower ones. The grip, being thus attached to the moving cable, is necessarily drawn along with its train of cars. The rate of speed is about eight miles an hour. The cars usually stop at each cross-street. The driver withdraws the pressure of the lever on the cable and applies, by means of a lever, a brake to every wheel in the train, stopping it quickly. The shops and office are situated on Twentieth street, where every inquiring person is welcome to observe the system as there on view."

General Viele continued :

"Chicago claims to be the centre of civilization, and if she continues to progress in advance of New York as she has in this matter of city transit, her boast will very soon be verified. Every word of that paragraph is true to my knowledge, and it is the system that is prevailing in Chicago and San Francisco. There is no reason why steam unobserved, unseen, and noiseless, should not be applied to move a car as well as a horse or a mule."

Thus sayeth General Viele. Observe this as the foundation of my argument on the physical and economical questions! Those eminent engineers who have been before you—Shinn, Boller, Hallidie, North and Endres—confirm General Viele. And could I speak of any opposing testimony except as the shadow of a shade, compared with such names as these? The world is full of engineers. I could lay my hand upon a score of them who would come to give expert testimony. My resources for the employment of expert talent are notoriously not small. The resources of the city to get such testimony are adequate to the purchase of expert stultification. But such a patent fact as I am arguing here couldn't purchase any man who had a remaining sentiment of respect for himself.

Compare any expert engineers on the question of the mechanical feasibility of our cable system with any other unshown head that is against us. Affidavits sneak in upon us. I can't cross-examine the affiant. He don't come here. Why has not the Corporation Counsel brought his experts here? It is evident I am meeting only his experts here. Why, if I had his experts

here, what do you suppose would happen? I would tear them limb from limb. How do you suppose Mackay would fare in my hand in the frame of mind I am? Where would be Crowley? if I had that boarding-house bilker under my thumb! What would I do with Birdsall, the man who lied, and knows he lied? and probably lied because the Corporation Counsel told him he must lie?

Compare such experts—and *no other appear here against us*—with my array of experts!

More than five months ago, on the opening of your investigation, I proposed to prove to you the utility, the desirability and the necessity of the Cable scheme of intramural transit which has been already commended to you by the report of Commissioners appointed by the then Mayor of this city.

The notice was conspicuous. It advertised my purpose to all possible objectors. No child in the land would have misunderstood that I meant to challenge expert testimony on the subject of cable roads as a feasible means of intramural transit for this city. It is for you to say whether or not I have vanquished all opponents who have dared to respond to my challenge.

The Mayor appointed his Commission on the 30th day of November, 1883, on the petition of one hundred and sixteen property-owners of the city. I cannot now detain you to say, nor is it needful, because you know, as well as I do, how the record reads, who those property-owners were, but I may say generally that they represented the mercantile and the real estate interests of the city, as appears from the record. It is said that these petitioners, headed by Horace B. Clafin, undoubtedly the largest and most conspicuous merchant of the Western Hemisphere, represented upwards of \$300,000,000 of the real and personal estates of the city. Gentlemen of the Commission, those petitioners demanded from the then Mayor of the City, Mayor Edson, a Commission under the Rapid Transit Act of 1875, to do and determine such matters and things as that act provided they might do and perform in the matter of cable roads, and in that demand they stated as follows:

To the Hon. FRANKLIN EDSON,

Mayor of the City of New York:

The undersigned applicants, residents, householders and taxpayers of the City, County and State of New York, would respectfully show :

First. That the act, chapter 606 of the Laws of the State of New York, passed June 18, 1875, commonly known as the Rapid Transit Act, and entitled "An act to further provide for the construction and operation of a steam railway, or railways in counties of the State," remains, as your applicants are advised and believe, substantially in full force and effect, as originally applicable to the City of New York, and is available, as its title implies, to "further provide" for rapid transit whenever required by the growth and business of the city.

Second. That under said act corporations may be formed with power to construct, operate and maintain cable-traction street or surface railways in the City of New York, in accordance with the system thoroughly and successfully tested in the cities of San Francisco and Chicago, for the conveyance of passengers and property.

The advantages claimed for the cable system may be summarized as follows :

1. The steepest grades are as easily worked as levels.
2. The cars may be stopped instantly or slowed gently at any point on the line, and started with promptness, ease and gentleness.
3. The speed can be established at any rate desired, and varied on any portion of the road to accommodate it to obstructions in the way.
4. The method of working is noiseless and even, and unaccompanied by any annoyance whatever.
5. Perfect cleanliness of track is secured, an important sanitary element in the system.
6. An unlimited capacity of increase at any time an increase may be required.
7. Perfect freedom from snow blockade, as the power is sufficient at all times to remove the snow as fast as it falls.

Third. That there is urgent need of this form of rapid transit in the City of New York on many convenient routes legally open to its introduction, especially as its economies of construction, operation and maintenance would enable it to carry passengers at any desirable rate of speed over long or short distances (stopping like the horse-cars at all street crossings to take on and let off passengers) for a five-cent fare.

Fourth. That the capacity of the elevated roads of the city is notoriously inadequate to the demands of the passenger traffic during the "commission" hours, and is swiftly growing inadequate to the demand for the other hours of the day.

Fifth. That each of your applicants, as householders and taxpayers of the City, County and State of New York, does severally depose and say that there is need in said city and county for a steam railway or railways for the transportation of passengers, mails or freight, and that such need exists beyond the facilities afforded by the steam, surface or elevated railroads now in operation in said city and county.

Wherefore your applicants respectfully apply to you for the appointment of five commissioners for the purposes and subject to the duties that are provided in and by the said Rapid Transit Act.

All of which is respectfully submitted.

In response to this demand, Mayor Edson appointed Commissioners. The Commission proceeded to the performance of their duties. That Commission was not the first one that had been appointed under the Rapid Transit act of 1875. Under the first Commission the elevated railways of the city were built. Five other Commissions followed, and then came, as the last and final one, the Commission from which the petitioner before you, The New York Cable Railway Company, derives its origin. This last Commission to which you Commissioners *are a sequel*, was appointed November 30, 1883. Now, Honorable Commissioners, you see where we are in point of genealogical succession. It is not necessary for me to tell you how and when, in minutia, the petitioner I represent before you became a corporation. That we are a corporation is known of all men, and there is nobody here as objector, nor can there be any legal objector, to question the validity of our corporation, *until the Attorney-General shall appear or some authority of the Legislature shall be exhibited*. The objectors before you, who raise law questions on the integrity of our corporate capacity are as children that play their baby palms against the inertia of matter vast and immovable as the globe.

Now, this question whether cable roads ought to be built as a feasible fact on the routes designated and fixed by Mayor Edson's Rapid Transit Commission is my question to argue and yours to decide. It is, in fact, the only question before you. You, as Commissioners, sitting in review of Mayor Edson's Commissioners, ought to attach importance to their decision.

But the Mayor's Commissioners, after all the proofs before them—and they were as voluminous and pertinent as the proofs that have been laid before you—were conscious that all the work

of their hands would be unavailing unless approved by you and by the Board of Aldermen. It has happened, therefore, that the petitioner laid its case before the last Board of Aldermen.

It is a matter of public history that that Board was restrained by judicial injunctions from taking action on the application of my petitioner for permission to construct its roads. The proceedings were craftily delayed, but finally dismissed. Too late, however, in the expiring hours of the Board came the dismissal to enable petitioner to urge its claims upon its consideration.

But it is well, and I thought it well on the opening of this investigation, that I should communicate to you the report of the appropriate committee of the Board of Aldermen on our application. Five months ago, on the opening of your investigation, I read that report; I read it to you now, to show you, in the light of the proofs we have produced, that if injunctions of the Courts had not intervened, the Board of Aldermen ought to, and probably would, have approved our system for intramural transit. I have the report in my hand, and I will read it as a part of my argument. I read it because it should be known of all men that that Board of Aldermen would in all likelihood have supported its chosen Committee, had it not been for a judicial injunction.

Here is the report:

Your Committee, to whom was referred the message of his Honor the Mayor of June 30, 1884, transmitting for the consideration of the Board the report of the Commissioners appointed by his Honor, November 30, 1883, pursuant to chapter 606 of the Laws of 1875, has carefully considered the same.

The matter of that message, as disclosed in the documents accompanying it, seems to your Committee of paramount importance on the subject of city transit. It seems a scheme of intramural transit involving a system of railways longitudinally on the east and west sides of the city, from the Harlem river to the Battery, partly elevated and partly surface, with convenient cross-town lines between the Harlem river and the Battery to connect with these longitudinal or axial lines on the east and west sides of the city, so as to reach all the important ferries and connect with the present elevated lines. This system embraces about seventy miles of road, which, if completed, would furnish ample and desirable facilities for our uptown residents on the east and west sides as well as all persons needing such facilities in the middle and lower parts of the city. This system gives for a single five-cent fare a passage over all these seventy miles in a continuous ride. Such a scheme of city transit should not be rejected if

its pretensions can be found practicable. And coming to your Committee, as it does, with the recommendation of the Mayor's Commission, consisting of Edwin R. Livermore, Thomas E. Stewart (the former Park Commissioner), Edmund D. Randolph, Joseph N. DeVeau and Edward L. Hedden, the latter three being presidents of the leading banks of the city, and presided over by Edwin R. Livermore, a wealthy merchant, eminent for his services in freeing the Erie Canal from tolls, and admittedly sagacious in all questions involving the commercial needs in the way of transportation in this metropolis, your Committee could not fail to carefully consider the merits of that scheme. The advocates of it have been before us frequently, attended by representatives of the largest property-owners of the city; and from them and many other sources we have become informed as to the merits of the cable plan of operating street surface and elevated railways. It is common fame that Peter Cooper, of honored memory, for several years before his death urged the cable plan as the only proper plan of city transit, whether for surface, elevated or underground railways. But your Committee has not felt that it ought to recommend the comprehensive scheme of transit proposed by the Mayor's Commissioners without a most careful scrutiny. A majority of the Committee have visited Chicago since the recommendations of the Commissioners were laid before us by the Mayor; and we found in that city a cable road in operation. It was the most important surface street railroad in Chicago, and second to none for extent of traffic and public accommodation in any city of the world. It carries daily an average of over 120,000 passengers, or nearly 43,000,000 yearly. It goes into and passes through the parts of the city most thronged by vehicles and pedestrians. It turns sharp corners with facility. It slacks and hastens speed at the will of the driver. It pleases the people of all classes, and is everywhere and by everybody referred to as one of the chief attractions and benefits of the city. A part of Chicago through which this road is operated is crowded and choked with traffic as is our city at Ann and Fulton streets at Broadway.

Your Committee, being confirmed as to these facts, has made it a matter of careful inquiry to ascertain all the merits of the cable system. The details of information in our possession are too many to particularize; but they may be summarized briefly as follows:

It gives speed without danger.

It gives a constant service irrespective of snow and ice.

It gives unlimited supply of transit facilities on any given route, and a seat for all—there is no standing room needful to occupy.

It fails neither in summer heat or winter frost. Storms of snow, wind or rain cannot retard or prevail against its uniform and steady service. The sanitary considerations involved in its substitution for animal power (wherever animal power may not be prudently dispensed with) distinguish health from pestilence. These are but some of the advantages of the cable system, and when presented to the city with the scheme of the Mayor's Commissioners, involving, as it does, transit up-town, down-town, cross-town for a single fare of five cents, on a line of seventy miles of road, which proposes such immense facilities for rich and poor, we can but recommend its adoption because we find that it is practicable.

Your Committee therefore recommends the adoption of the following resolution :

Resolved, That this Board, on behalf of the corporate authorities of the City of New York, hereby gives consent to the routes, parts of routes and branches adopted by the Commissioners appointed by the Mayor, November 30, 1883, as contained, described and set forth in the Articles of Association of the New York Cable Railway Company, transmitted to this Board as part of the report of said Commissioners, by the Mayor, June 30, 1884, which Articles of Association are a component part of the Charter of said company, and as such were filed in the office of the Secretary of State, and in the office of the Clerk of the County of New York, April 22, 1884 ; and further, that this Board, on behalf of the corporate authorities of the City of New York, hereby gives consent to the construction, maintenance and operation by the New York Cable Railway Company of the several railways mentioned and described in said Articles of Association, upon the several routes, parts of routes and branches of routes fixed and determined by said Commissioners, and in the forms, manner, and under the terms and conditions fixed and described by said Commissioners and set forth in said Articles of Association, and also gives consent on behalf of the corporate authorities of the City of New York to the said company to remove pavements and crosswalks on said routes, parts of routes and branches, and do thereon the necessary digging and excavating for constructing, maintaining, operating and using steam railways for public use in the conveyance of persons and property in cars for compensation in the City of New York, and for building and laying tracks for said steam railways and for all the necessary appurtenances thereto, and for maintaining and operating and using said steam railways on said routes, parts of routes and branches for the purposes aforesaid, pursuant to the terms and conditions prescribed and fixed by the said Commissioners in said Articles of Association of said New York Cable Railway Company ; provided, however, that said The New York Cable Railway Company pay annually on or before the 31st of January in each and every year, to the Comptroller of the City of New York, for the use of said City, two and one-half per centum of its net earnings for and during the preceding calendar year, as a compensation for the franchises acquired by said company pursuant to chapter 606 of the Laws of 1875, and the amendments thereof. such compensation to be in addition to all taxes said company may be liable for, or which may be imposed thereon pursuant to law.

C. B. WAITE,	} Committee on Railroads.
ROBERT E. DE LACY,	
CHARLES DEMPSEY,	
WM. H. MILLER,	

Now, I ask, why should the courts have granted injunctions to restrain the Board of Aldermen from consenting to such a system of intramural transit as the Report of their Railroad Committee describes ? Who obtained those injunctions ? It is my duty to tell you. Who perpetrated the judicial interference ?

You have experienced that interference in this investigation. You know that for five weeks your powers were held in abeyance by the same interfering hand. Now I ask you to consider whose hand that is, or was. If you are troubled to identify that hand, let me remind you that in the foreground of the opposition that I am contending against stand fifteen horse-railroad corporations.

First, the Broadway, Lexington and Fifth Avenue Railroad. 2d. The Central Park, North and East River Railroad. 3d. The Chambers Street and Grand Street. 4th. The Christopher Street and Tenth Street Railroad. 5th. The Dry Dock, East Broadway and Battery Railroad. 6th. The Forty-second Street and Grand Street Ferry Railroad. 7th. The Forty-second Street and Manhattanville. 8th. The Houston, West Street and Pavonia Ferry. 9th. The One Hundred and Twenty-fifth Street Railroad Co. 10th. The Second Avenue Railroad Co. 11th. The South Ferry Railroad Co. 12th. The Third Avenue Railroad Co. 13th. The Twenty-third Street Railroad Co. 14th, The Thirty-fourth Street Railroad Company. 15th, The Broadway and Seventh Avenue Railroad Company.

I include in this list all those horse railroads that are born and in being and in operation, and those which are sought to be built.

I want the fact known that these opponents are opponents representing existing horse-railroad companies, and horse-railroad companies that wish to exist, mere *franchise hunters*; which latter are very much in the condition of the infant maid that William Wilberforce met on the streets of London, and on whose baby brow the great philanthropist read the reeking word, "wanton," and to whom he said "I hope, my child, you are not a bad girl?" and she answered, "No, but I 'opes to be."

I want to show here that the only strenuous objection arises from horse-railroad corporations that exist, and from franchise hunters who want franchises that are assigned to our cable system and which they hope to get for horse railroads. I call these latter "franchise-jumpers," for they seek the ground the law has given us to occupy. Later on I shall show their fraud and their folly.

Such are our opponents; outside of them I see but little opposition of consequence. In William street, for instance, there

is an opposition on the part of the property-owners which extends from Wall street to the Brooklyn Bridge—a distance of 2,800 feet in the decayed or decaying portion of that unthrifty street. *There*, the opposition may be said to be unanimous. But the gentlemen representing that opposition have frankly told you that they have visited those property-owners and solicited them to allow them to come before you and make opposition. I gather this from the counsel's own lips on his argument, and he won't deny it.

Now, I know that it is a very common matter for bustling attorneys, not over absorbed in general practice, to visit property-owners on a particular street and say to them a variety of things that would induce them to join in opposition to a scheme of transit like the one proposed by the petitioner, *provided always, attorneys and counsel shall charge little or nothing for services in making opposition*. It is not a case of *audi alteram partem*; it is a case of one-sided misrepresentation. They say to a property-owner, "If you will refuse—and this road is built—we will have a right of action, *a la* Story against the Elevated Railroad; or if you refuse and make opposition, why probably the railroad company will give you some of its stock, as Mr. Gebhardt, the father of Freddy, the illustrious *jeunesse dorée* of the bewitching Langtry demanded, whose demand appears in the affidavits which our adversaries have presented, wherein he says: "If I could have compensation for signing on Lexington avenue on my property, I would sign." The case these attorneys present to the property-owner is generally stated so as to appeal to his cupidity or his vanity by making him of importance as a *qualified* obstructionist—qualified by his loud proclaimed ownership of property; or, by appeal to his timidity arising from the apprehension that public improvement affecting his property may possibly depreciate it. I could enumerate a score of other reasons of most unworthy character which induces property owners to make objections. All these invitations to opposition are artfully addressed to the property-owner so that his mind is left in no condition to consider the merit of the proposed improvement, or to listen to the arguments of its promoters; such an objector (*assuming that he has not been "worked" knowingly or unknowingly by the horse railroad inter-*

est as is the case with nearly all that class of objectors who have appeared before this Commission), especially as his opposition is inexpensive, is not inclined to consider the advantages of the proposed improvement to his own or the public interest, and is little likely to say to the canvassing attorney, "I will consult the projectors of the improvement before granting my authority to oppose it—I will hear their arguments." No! Such an objector is not suffered to be left by the canvassing attorney in that condition of mind. So people may be stimulated upon industrious application of active attorneys or agents to withhold the consents we need, or even unite in opposition, if it don't cost much, for the purpose of having claims for damages or getting our stock free. There are some other objectors, all of whom I now enumerate:

First.—The objectors who oppose our main axial line because it must pass through Gramercy Park; as if a main artery of traffic, on the east side of the city, from the Harlem river to the Battery, and a distributor of traffic from river to river, should be *tourniquetted* at that Park, and its flow arrested and destroyed because of that private park, owned by the householders around it, in a region of the city that for the last twenty years has been known as "*Boarding-House Square*"! The clamor of these people induced me to invoke the taste and judgment of Calvert Vaux as to whether or not such changes in that Park could be made, and yet allow the cable road through it, as would result in beautifying it. The suggestion that induced me to do this came from one of our most distinguished citizens—a citizen whose incorruptible integrity in the administration of the fiscal affairs of this city makes us think of Aristides. I acted on his suggestion. I communicated with Mr. Vaux, who is known as the foremost landscape artist (as well as a great architect) on this continent.

I stated the case. He at once said to me: "The Park is now as flat and uninteresting as any such plot of ground can be, unadorned and unimproved by art. I will present you three drawings, one showing how the Park now is, one showing how the Park could well be and accommodate your cable road, and another showing how, with Roman gateways, and arches and labyrinths and staircases for exits and entrances, it might be a thing of beauty and interest."

These drawings have been laid before you as a part of our proofs. I know, from the open satisfaction you expressed at the time they were offered that you could see how Gramercy Park could be an ornament to the city, and more useful, more valuable, more beautiful, if Mr. Vaux's plans should be adopted. Mr. Vaux's affidavit accompanies his plans. To conciliate our opponents, I struck off one hundred photo-lithograph copies of them and sent them to each householder, and challenged their attorney, Mr. Varnum, to say whether or not if we would make the necessary changes, in conformity with these plans, at our own expense, he would not withdraw this opposition. What answer did he make? You heard it.

This answer was substantially: "We are not on the art of the question nor the beautification of the grounds, but, if this road must go through the Park, we want to sell to this company the space of two city lots on each side of it."

That ended, of course, the æsthetical question. We offered before you to make the adornments suggested by Mr. Vaux, which would make the Park, not what it is now—a dreary uniformity—but an undulating, classically-fashioned, umbrageous, path-adorned, flower-bedded and in all æsthetic ways diversified by fountains and by trees and plants, if they would permit our road to pass through it. This they declined. There is urged before you in support of that declination the affidavit of Ex-Governor Tilden, the sage of Greystone, who, by the ordinances of nature, on account of the infirmities of age, may never visit Gramercy Park again. This affidavit is made to do duty here. In it it is stated: that no more transit facilities are needed in this city, and that Route No. 1, our great east-side axial route, is especially unnecessary; that such axial line spoils his lot and premises fronting the Park. He protests against it as an act of vandalism.

It will readily occur to you how selfishness grows with age and feebleness, when you remember that he promoted our elevated lines and thundered his locomotives close by the windows of the residential portion of our city, and destroyed, as the Courts have declared, millions of property used for residential and business purposes. Like an enormous Juggernaut, all private properties

had to submit to the nuisance and noisome operation of elevated roads—I may say *his* elevated roads, out of which he more than doubled his then enormous fortune, and has thereby made himself one of the richest men of America. Like a ruthless Goth he plundered, pillaged, encroached upon private rights, the peacefulness of firesides ; and now he cries out like a sick girl against the public necessity that demands a transit through a park which Mr. Vaux shows will be enhanced in beauty by our transit, for the reason that he apprehends that it may hurt his “city lot.”

The same may be said of the statements in Abram S. Hewitt’s affidavit, who made like money on the elevated railways in a like way, and who likewise lives on Gramercy Park. This looks to me like selfish hypocrisy.

Second. — Jacob Sharp’s objection about Twenty-second street :

All the proofs offered on this subject were gotten up two years’ ago to be used by him before the Legislature. I met them there before committees in his hands, where they were based on the same Crowley affidavit now before you, to the effect that the cable roads in Chicago were but another name for calamity and scorn in that city. All this is now stale matter—not then understood as we now understand it in the sunlight of publicity. It cuts no figure here, knowing what you know, from the proofs before you. You may exclaim with Ophelia, on this evidence, “To have seen what I have seen, see what I see.”

Third.—The objections to our Broome Street Route all came from Jacob Sharp, and are based on the Crowley variety of expert testimony—that, and nothing more. It is presented and indorsed by his counsel here. The school-house suggestion on Fourth street, and the wanton-house suggestion on Thirteenth street, alike seem to have been managed by Mr. Jacob Sharp—all under fear that we would parallel his horse-railroads on Twenty-second street, Thirteenth street, Fourteenth street and Broome street.

That is the sum and substance of all the noticeable objections that we have had here from any quarter whatever, except on Lexington avenue, where the majority of the citizens, as we have shown

in the proofs laid before you, favor our cable road. I ought, also, to except Mr. Wheeler H. Peckham's objections on behalf of some property owners on Madison avenue; they are, however, almost too trivial to remember, in the light of the industrious attorney business I have exposed. I know but one man who *seemed* to have thrown the earnestness of his soul into the business of opposition. He is Mr. Ross, and the Commission may have observed that I have not concealed my desire to conciliate Mr. Ross and make him feel that there would be no injury to him if the road should be constructed. He may be perfectly sincere in his opposition. He is a builder and a business man, and has been for many years, and these builders are not children in the matter of personal advantage and an eye to their own interests, and he probably may have some object in view, as Freddy Gebhardt's father has, distinct from the public interest, to promote his own advantage aside from the special object of protecting, as he says, that particular piece of property he owns on William street. I am not at liberty to forget that one of these builders, Buddensiek, was only yesterday sentenced to the State prison for ten years. As a class they are not altogether worthy.

This is the opposition, substantially. How has that opposition worked? Our adversaries, after a five-months' investigation, have disclosed their purposes by filing an application in the office of the Secretary of State, claiming that the routes which we have applied for are needful and desirable for horse railroads. I have here their articles of association, filed in the office of the Secretary of State only a day or two since, for roads over Liberty street, and Cortland street, and Maiden Lane and in William street, and down Wall street. These articles contain the name of Daniel D. Conover, who is president of the Forty-second street, Manhattanville and St. Nicholas Avenue Railroad, represented by Mr. Trull and by the brilliant talents of Mr. Coudert, and also by Colonel Wagstaff, Vice-President, or Treasurer, as he says, of the same railroad.

I have also here, officially certified, articles of association of another company, filed only yesterday in the office of the Secretary of State, which seeks to appropriate some forty other miles of our routes in the central and upper part of the city, includ-

ing all of Lexington avenue, to the use of proposed horse railroads. The names subscribed to these articles indicate unmistakably that the Secretary of the Navy, William C. Whitney, late Corporation Counsel of the City of New York, Jacob Sharp, and a combination of Philadelphia capitalists, among whom is "Bill" Kemble, of "addition, division and silence" notoriety, are the projectors. The Sharp ear-mark appears in these articles by two of his well-known henchmen, one of whom is the Superintendent of his Twenty-third Street Railroad. Secretary Whitney and Kemble appear in the articles by their notorious colleagues and partners Elkins and Widner of Standard oil and Philadelphia horse railroad fame.

Here is richness—I promised to show you the fraudulent character of this opposition. Behold it! I cannot contemplate with patience what is proven by these articles of incorporation. They show that you have been detained here weeks and weeks to listen to a shamefully fraudulent opposition, made with every profession of good faith as in the public interest against the cable railways proposed by the petitioner, on the ground that public convenience did not require railroads of any sort, cable or horse, on the surface lines laid out by Mayor Edson's Commissioners.

But these articles disclose a darker and deeper stain of fraud and venality, which are known to be common attributes of horse-railroad managers and projectors when pursuing schemes to protect, gain or enlarge their franchises. To them the covert lie—the venal gift—the flagrant bribe or falsehood—are notoriously trivial and common matters. But when we find a public officer contributing to their nefarious work out of the public Treasury, at the expense of the taxpayers of the city, as the Counsel to the Corporation is doing here, a more serious aspect is presented. Again and again I have challenged the right and propriety of the Counsel to the Corporation to appear here in the name of the Mayor, Aldermen and Commonalty of the City of New York, but with unabashed face he has persisted in that appearance, and this Commission knows that nine-tenths of the expense and proofs of the opposition in this inquiry has been borne out of the city treasury by direction and on the mere

motion of the Counsel to the Corporation, who is represented here by his brilliant assistant, Mr. Wickes, without any warrant whatever from the competent corporate authorities of the city, the Common Council, which is charged specially by statute with the duty and responsibility of deciding whether or not the cable railways of the petitioner should be built.

Not only has the Corporation Counsel's office incurred this unwarranted expense and made this unwarranted appearance, but the evidence collected by its much indorsed Sterling and its other agents has been demonstrated to be perjured and false. I characterized it before you, shortly after the taking of proofs was closed and before the summing up on either side began, as the product of perjury and subornation of perjury, and I was permitted to make overwhelming proof of my charge by the introduction of the affidavits of Mr. Holmes and the stenographer Edwards. I have placed that office upon an eminence of infamy beyond the reach of rescue or explanation. My associate, Mr. Wheeler, unites with me, as I feel that you must do, in pronouncing Sterling's evidence a perjurious suppression and misstatement of the matters about which he testified, and the evidence collected by him, to which others made oath, as perjurally suborned. The proof I presented of these charges was not only by the mouths of two or more unimpeachable witnesses, but by incontestible documentary evidence.

By appearing here to oppose the necessary consent of abutting owners, whose consent you are to give if the Court approve, the Corporation Counsel is attempting to make ineffectual the equally necessary consent of the city, should the city decide to give it. So that I see that he is exerting himself here to make the city's consent ineffectual should it give it or wish to give it. Thus he seeks to deprive it of its autonomy and participation in, and absolutely cut it off from, its right or duty to participate. What sort of a position is that for a lawyer to sustain to his client? If the city want our cable roads, and shall, after a proper inquiry, decide it wants them, through its Common Council, the Corporation Counsel is here endeavoring to prevent its ever having them. Is that a proper position for counsel to be in? Is he here hedging under a bargain and contract with some outsider, that the city

shall never have an opportunity to say whether it will consent or not? For of what possible use could the city's consent be without the abutting owners' consent? These two consents must go together, to complete authority.

Now, the Corporation Counsel is here trying to prevent abutting owners from consenting. Don't he know that if he succeeds the city's consent would be a vain thing? Of course, he does! Though the Mayor, Aldermen and all the city officials, hat in hand, should appear before you and demand cable roads and should vote, ordain and declare them useful, needful and necessary—should they come here in this plight, are you to tell them that the Corporation Counsel has been here, and is here, to tie you up and to show that you can't have these roads because he has convinced you that the abutting owners ought not to *consent to* have them? What sort of a situation is this for counsel to be in? There was a counsel in Israel; he was a sort of lord chancellor to King David, and had an intrigue on both sides of the court. He advised many villainous things and gained confidence out of his supposed wisdom and the integrity of his counsels. "And the counsel of Ahithophel, which he counseled in those days, was as if a man had inquired at the oracle of God; so was all the counsel of Ahithophel both with David and with Absalom."

This story is an interesting one and may be found II. Samuel, xvi. and xvii.

The Corporation Counsel may find it a precedent which describes the difference here between him and me.

Now, I ask, why is the office of the Counsel to the Corporation here in this strained, compromised and degraded attitude? It is my duty to name the reason why. William C. Whitney, the former Counsel to the Corporation, the present Secretary of the Navy and an influential leader in our municipal politics, retains a surviving influence such as might be expected to inure to one who has named his own successor over the Corporation Counsel's office, and in association with the Philadelphia parties I have named, becomes a partner in the horse-railroad schemes of Jacob Sharp. He uses that influence to constrain the present Corporation Counsel to lend him and Jacob Sharp the power and influence and resources of that office, involving, as they do, large

expenditures from the City Treasury, to oppose the petitioner's system of cable railways, to the end that Jacob Sharp and the Philadelphia combination may acquire horse-railroad franchises on the routes designated for our cable railways.

The law abhors busy-bodies. Fifteen horse railroads come here and shout, with the Corporation Counsel, "This Cable Company can't be made to hand over the pound of flesh provided in the bond due to the city in case of defeasance in any particular." This solicitude is too silly to discuss. Every one of those roads have notoriously defaulted for years in the payment of *their* inadequate licenses to the city, and there is a popular suspicion afloat that they get immunity from the payment of those licenses by corrupting the law officers of the city. I mean, and may bluntly say, Ahitophel. What are we to do with such a situation as I have exposed here?

There is Sterling! I have put the brand of gross, bold perjury on him. He was the city's deputy. I am sorry that this was *our* necessity. It may have been *his* necessity to do the perjury, like the poor apothecary in the play. He was the city's deputy. He was sent forth by the Counsel to the Corporation. Was he instructed and paid to play a trick? Did he lend himself to a dishonorable employment?

Well! well! well!

But Sterling is an *unsterling* trifle in this discussion. I return to the OFFICE of the Counsel to the Corporation of the City of New York. In the interlocutory discussions before you about STERLING, I had a notion, and unfolded it, that there was the stimulation of "Peruvian bark" within him. I meant the Mayor of the city, and you know it. I am now satisfied that the Secretary of the Navy—a cabinet officer of President Cleveland—has *brought* the opposition of the Corporation Counsel here. I welcome it. I know it. I feel a timid, but audacious, hand upon my sleeve as I speak. Its touch carries suggestion of corruption in every branch of the municipal administration of the city. It carries it into State and National politics. The world is wide enough for that man and me. The wide, wide sea has got enough boat-room, John Roach's "Dolphin" included, for him and me! Our poetical Commissioner of Public Works might

turn all this into sonorous and exquisite verse. If he plies his "prentiss hand" to the work, let him tell us about Mackey's and Birdsell's testimony—the testimony of two of his subordinates.

Let him say whether it comes by "*Grace*," as has been facetiously suggested, or by the Secretary of Uncle Sam's "Navee."

Let us now look into the propriety and right of the Counsel to the Corporation appearing here. Let him justify his appearance. Can he say that the Constitutional Amendment of 1875, or the Rapid Transit Act of 1875, or the Surface Railroad Act of 1884, or any clause in the ancient or modern charters of the city brought him here? No. Emphatically No. Why, then, is he here, playing busy-body?—bothering you and using the city's money to make opposition to me.

Who has paid for the large maps hanging on your walls? Who has furnished the printed volumes of evidence that convict its author at a single shot of both hate and impotence? From what source springs this astonishing energy? The Counsel to the Corporation has no right to be here. Why does he come with all this expensive array, paid from the city treasury?

I speak for the petitioner. Why is he here to speak against me? The advocates of the horse railroads have no arguments and supply no opposition except from him. Has it come to this, that I am to make proof of a long-suspected fact, that the horse railroads own the Corporation Counsel? I take no delight in this line of argument. The Commissioners *may* apprehend the necessity that drives me to it. I say, in dismissing the subject, the Corporation Counsel has no right to be here. He is not an *administrative* officer. *He can't originate, prosecute, appear or decide, of his own motion.* He should be cold and frigid, immovable and motionless, indifferent and out of sight, while we are addressing the Common Council on this question for its consent. The Common Council will tell him if they need him. He has no right to speak until it asks him for advice. Administrative consent lies in that body. He is not to busy himself about the matter until they do ask him. He has no right to forecast their conclusion—to influence their administrative determination about the consents we seek. If the Common Council *should* consent to our scheme, he can't oppose it. If it refuses consent

he has no occasion to oppose it, for without that consent our scheme is dead. The Mayor has not a right to send him here; the Commissioner of Public Works can't send him here; the Dock, Park, Police or Excise Board can't send him. Why then is he here? Dare he say? He has been unmercifully prodded on the question—Why is he here? Why does he attend on this inquiry with costly maps and an expensive array of documents for the benefit of horse railways, out of the City Treasury. I know why I am here; I pay, as required by statute, for all the cost of promoting this proceeding. But I want to know if there is any warrant granted to the Corporation Counsel for making the tax-payers of the city pay for opposition to me in this inquiry—an opposition in the interest of horse railroads. No child can misunderstand that there is a matter here to be explained. Where is the Sphynx? It is the hand of Whitney, but his ESAU has the voice of JACOB—SHARP.

I don't think, as the line of my remarks courses, that I shall have further occasion to speak of Secretary Whitney or the Counsel to the Corporation, but I may; for I cannot be responsible for the restraint of my indignation. I shall endeavor to avoid further allusion to them. You know the nature of the ineffaceable brand I have put on them. The whole city knows it. It is known in Philadelphia. I speak of it because all the world should know it.

This brings me to the presentation of the proofs I have laid before you as to the merits of the cable system, about which, under the guiding hand of the office of the Counsel to the Corporation, Sterling, Birdsall, Mackay and Crowley, adverse testimony has been borne. I believe these include all the mechanical engineers or expert pretenders of any description that the Corporation Counsel or Jacob Sharp or any other objector has brought before you to show the infeasibility of cable roads.

For the moment I ought not to speak of the testimony on the sanitary question. But, lest I forget it, the interesting and instructive testimony of Professor Doremus, by which we know to pounds and ounces the fæculent voidings of horses employed to operate the horse railroad traffic which strew our streets and breed diseases in the throat, eye, nose and ear, and offend and disease every organ of sense, must not be overlooked by the Com-

missioners. The enormous quantity of these voidings, amounting to hundreds of tons daily, and tens of thousands of tons yearly, cut an appalling figure in our statistics of vitality. The health of our citizens is exposed to such jeopardy from them, that we are left to conceive from the powerful presentation of Professor Doremus and the other medical and scientific gentlemen who support his testimony, that the hand of the destroying angel gains its chief vigor from this source.

Compared with this presentation, what can be said of the ridiculous mass of evidence introduced against us on sanitary grounds by the Counsel to the Corporation. His testimony is evidently officered by a prominent physician of the city, who, we have been told by counsel making the arguments to which I am replying, was conspicuous as a passenger on the early morning car in which Jacob Sharp celebrated the opening of his railroad on Broadway. This early morning inauguration will not be considered to be without significance as to *his* testimony.

Perhaps I may not recur again to this sanitary question in the swift propulsions that crowd on my argument. And it may be appropriate here for me to make all the criticisms that I care to make upon the sanitary evidence produced by the opposition. First, I say, all the testimony produced on that question was testimony notoriously gotten up by Cyrus Field and Jay Gould in the interest of preventing excavations to underground their telegraph wires. The whole city knows that to prevent undergrounding those wires every approachable source of medical authority to prove it sanitarily dangerous was invoked, and, curiously enough, the family physician of Cyrus Field and Jacob Sharp, the physician who rode on Mr. Sharp's inauguration train down Broadway, Dr. Loomis, was the very physician who has made himself conspicuous in supplying testimony to show the sanitary calamities that would happen to the city, provided our cable railroads should be built!

I have read that testimony carefully. It is the same testimony, *mutatis mutandis*, given against undergrounding the telegraph wires. I leave that question here, and my opponents may rejoice over all the inferences they may derive from it. I see in it only

Jay Gould's telegraph testimony revamped to suit the situation impugning our scheme. Is it possible that the Counsel to the Corporation has a muddle with Jay Gould? This conundrum I leave to those whom it may concern. I have business enough of my own outside of such questions. Children should not play with fire. I am in no humor to have the Corporation Counsel here. He ought to go away. I know a thing or two about his being here that is not to his advantage. I say, get out, if the office wants to save Mr. Whitney.

On the remaining portion of our lines, my friend, Counsellor Scribner, appears and exalts his horn. Of course, Jacob Sharp sent him here. Of course, he has no other mission or motive than to do and say things which Jacob Sharp wishes him to do and say. My friend Trull, speaks for Conover. My friend Lauterbach, speaks for Henry Hart, of the Third Avenue Railroad. These three advocates of horse railroads really and truly, as your Honorable Commission know, represent all the noticeable objections to the petitioner's scheme of cable transit. Whoever has spoken against it outside of them has had his stimulation from them or the interests represented by them. The Commission may therefore consider that the contention before them is, purely and simply, a contention between the horse-railroad companies and the petitioner's company for the introduction of cable roads.

This contention admits of no compromise. The cable road advocates comprehend the magnitude of the struggle. They knew from the outset that they had to fight, tooth and nail, the horse railroads, to gain a footing. The horse railroads knew that a costly battle must be fought to defeat the cable railway. In the Legislature that battle was fought last year, and the Cable Railway Company lives to say that the Legislature has confirmed its right *so far as the State can confirm it*, to the routes granted it by Mayor Edson's Commissioners.

Now, where do we stand? The routes are acknowledged to be necessary routes of railroad transit. There is a *cognovit* on that question. The Mayor's Rapid Transit Commission was justified in so declaring, and you will be justified in indorsing their declaration. They are necessary, not merely on the northern end of Manhattan Island, but necessary at the ferries south of

Chambers street and across the lower end of the island ; necessary, in the judgment of the opposition, at that part, more than at the upper part, as is evidenced by the fact that, as I have just shown, they have filed on Cortlandt, Liberty, William and Wall street for horse railroads. So I beg the Commission to dismiss the idea, that it is seriously contended that there are any objectors to railroads in that part of the city upon the ground that they are not needed, or that they are impracticable, for we are all agreed, petitioner and objectors, that they are needed, and we are all agreed that they are practicable.

Now, what is the next question ? The next question is as to whether there shall be a cable road or a horse railroad on these down-town streets. We say they should be cable railroads. The horse railroad objectors say it shall be horse railroads ; their articles are filed for horse railroads, and I hand those articles to the Commission.

Mr. COLLIER—I object to counsel arguing here on matters not in evidence before the Commission.

Mr. SHAW—I claim the right to draw my proofs from any official quarter. If I choose to consult the Secretary of State's office and lay before this Commission documents, whether formally placed in evidence or not, I have a right to do so. You cannot deny me access to the archives of State, and if you choose to put into those archives matter that gives your case away, that is my fortune and your infirmity. Don't imagine for a moment that you can make a lying opposition here and at the same time press for an advantage elsewhere. I intend to let these Commissioners see your stultification. You may not enjoy it, but the Commissioners cannot ignore it. We closed our proof some weeks ago. Since then, by filing these articles, you have given the lie to all the opposition you made in those proofs. Take your little bed and lie down in it. Now the question arises shall we build our cable roads or shall the opposition build their horse roads. That is all there is of this contention. If we build them, we build them as a part of a system, and they will be cable roads, and passenger transportation on them will practically be free, because we do not charge fare on transfers across them. If the opposition build them, they will be several distinct horse railroads, and there will

be a separate five-cent fare exacted from passengers on each of those roads.

At this point are raised questions of law ; and it is with these questions that I am now going to principally deal. When I interrupted in his argument, my friend, Mr. Trull, to observe that the elevated railway litigations had furnished a precedent, he did not say, "Precedent be hanged !" but he did say he did not care for precedent ; he said he relied upon the statute and the law. Now we do care for precedent, and that is the only way we know the meaning of the statute ; that is, the only way we understand the law, is by the special interpretation of it by the courts of last resort.

Now, what have the courts of last resort done under this Elevated Railroad Act or Rapid Transit Act ? They have passed upon all the legal questions that the objectors here have raised. Those objections have been through the courts over and over again. They have been presented to the Court by these same objectors with all their force, not one point excepted, though my friend Mr. Trull, said there were some points that he presented yesterday that had not been presented to the General Term, but he failed to point to one. Yet the very truth is, every point was presented, and that Court has remitted that old question back to you to make a report upon, whether or not public interest, public convenience and public accommodation would be promoted if our cable railroads should be built.

And that is your question. You are to say whether, as a physical and mechanical fact, cable roads are practicable, preferable and desirable as a means of city transit upon the routes proposed to be built upon by the petitioner. You are to say whether public policy and convenience demand these cable roads. You are to say whether the public services contemplated by their construction are desirable. You are not to bother your brains with legal finesse and split hairs between the northwest and the southwest side respecting the construction of statutes. You are not here to draw fine legal lines as to our corporate powers, our corporate capacity, our corporate entity ; nor are you to do or deal with finespun theories about the law of this case ; but you are to do and deal with the question as to the utility, necessity and

desirability of the cable roads the petitioner proposes to build. That is what the General Term, whose commission you hold to investigate this matter, expects from you. The General Term of the Supreme Court will take care of the law questions and you are to take care of the physical, mechanical, economic and utilitarian questions involved in this inquiry.

Chairman PELTON—You need not argue this proposition any further. We conceive it to be our duty to pass simply upon the desirability of the system. The law questions may be raised at the General Term. That is the Commissioners' understanding, derived from the intimation of the recent opinion of the General Term of the Supreme Court in this matter.

Mr. SHAW—This being an economical question, a practical question, in the economical affairs of this city, and not a question of law, you may well close your eyes to all law books and all suggestions of difficulties in the law part of this case, and tell us whether or not the public convenience would be subserved if those roads were built. That seems to me to be your duty. But I can see that possibly, in making up your mind, you may try to determine whether or not you are doing a vain thing, and thus indirectly and most potently consider the law questions that have been raised by these objectors; you might think these roads ought to be built, every one of them, and yet you might be impressed with the arguments that have been uttered here, and the objections that have been put forth, that there was some defect in the charter of our company, some difficulty, something by which, even if you desire that this company should accomplish the purpose of its being, this company never could accomplish that purpose for the want of legal capacity, power, legitimacy and authority.

Now, Commissioners charged as you are with the gravest duties to the public on a question of gravest public concern, who ought to view the outcome as well as the beginning of your labors, who should work upon the old Baconian philosophy, "The fruit is the result for the public," you should know precisely whether or not this corporation is competent to take what it petitions for, and execute lawfully what it asks to be intrusted to execute. Your functions as Commissioners charged with this important matter of public services will end in dust and ashes unless our

corporation has legal capacity. You are all lawyers. You cannot and you will not shut your eyes to this fact. If the Divine mind had exhausted itself in perfecting the physical conditions and felicities of our system and we were without legal capacity, your work would be vain, fruitless. You may well, therefore, inquire, as our opponents demand that you shall do, whether when the objections that are urged here shall reach the General Term, there will be found legal embarrassment or difficulty in confirming your report, if you make it in favor of the petitioner. I think it fair, considering the great need and pressure for these public facilities and services we propose to offer, that you should look into the probabilities of that matter. I know that if you were not fixed in your opinion, or were doubtful, or hesitating, or halting as to whether or not there were defects in our charter, you would not take this deep interest in this inquiry, because you would not know but that it might be abortive and unavailing. And it is for this reason that I argue questions of law with you: not because I think you have the *right* to listen to the suggestion of opposing counsel criticising the determination of the General Term in sending this matter for you to look at as a physical fact with your eyes, and not to decide by captious, legal quibbles suggested as matter of law by objectors' counsel.

Now in that view, I wish to say, that the Cable Railway Company is organized under chapter 606 of the Laws of 1875, known as the Rapid Transit Act, although the words "rapid transit" do not occur in the act, nor is there any suggestion of speed and dispatch in the whole act. Under that act the elevated railroads of our city were built, and all the questions that have been raised here were raised before the Courts that decided upon the constitutionality of that act, and upon the regularity and legality of the work of the Commissioners who wrought under it. And it is upon that precedent that we rely to show you incontrovertibly that in no respect, in the slightest, technically or substantially, is there one particle of irregularity or fault in our articles of association. The Court of Appeals having passed upon the law, the method of procedure being known to us all, the precedents were numerous enough to enable counsel of ordinary ability to know precisely what to do—or a commission of ordinary ability to deter-

mine precisely what to do about laying out routes under this Rapid Transit Act. The Cable Company's Commission was the seventh Commission appointed under that act. The bar were familiar with all the proceedings necessary to be taken. The path was well trodden; all the questions had been well considered.

It was under these circumstances that the Rapid Transit Commission which gave the Cable Company its charter was created. I have here a book of the proceedings of the Commissioners that gave us the elevated railways in 1875; I will call it "Elevated Railways." I have here, also, a book of the proceedings of the Commissioners that organized the Cable Company; I will call it "Cable Railways." Look at these two books, which I hold in my right hand and in my left. They are of about equal size. Weigh them in the balance and you will find that their avoirdupois is about the same. Don't mistake me. I want these two books, like Siamese twins, to walk hand in hand, flesh in flesh, before you. Look at them. As to their contents, I can truthfully say that all the clauses in one and all the clauses in the other, upon which objections have been made, as to the legality and propriety of the proceedings that resulted in the elevated railways and in the cable railways are strictly similar, except in the particular that the Cable Company was not bound to build its proposed roads until it had obtained legal authority to do so after the exercise of due diligence. That exception, and that alone, is the only departure from the precedent afforded us by the Rapid Transit Commission that gave us the elevated railroads. *I propose in the progress of my argument to deal with that exception.* I am prepared to defend that departure, on the authority of elementary writers and the precedents the jurists of England and this country have furnished. If you will take the proceedings of the Elevated Railway Commissioners and the proceedings of the Cable Railway Commissioners, you will discover from comparison with what slavish servility, if I may use the expression, the Commissioners of the Cable Company followed the proceedings of the Commissioners of the Elevated Railway Company. Not in the slightest particular, in no place, nowhere, was there any departure at all from those proceedings, except in the particular I have stated. And the opinions of counsel

recorded in the proceedings of the Commissioners that gave us the elevated railways were the opinions that the Cable Railway Commissioners followed in their proceedings. All the questions of location, and prohibited streets, and provisos, and stations, and plans and structures on the surface so much dwelt upon by the seventeen lawyers that have addressed you on behalf of the objectors, were raised in the original Elevated Railway Commission, as they are here, and have been overruled by every court of competent jurisdiction in the land, and have been ignored as they ought to be ignored in the proceedings of the Cable Commission.

And yet, that being the case, these objectors come here with what? Well, we with slavish servility followed the precedent of the Elevated Railway Commission, while they weakly and servilely followed the objectors to the work of the Elevated Railway Commission. They have done nothing but retail into our ears and into the ears of the public, and through the press, the very objections that were made and answered in the Elevated Railway cases. I can give you five pages of their objections, copied *verbatim et literatim et punctuatim* from Mr. Parsons' brief. The objection they dwelt upon, the only new one, is the objection made by Mr. Wickes about the Supervisors.

All this matter has been gone over, and now why have they done it? It is to plant in your minds the idea that if you give these routes to my petitioner the courts will upset your determination. That is one idea; they think to deter you from looking into the solemnities of the great work before you by saying it will peter out in some sort of way, and fall by the force of these objections. They have another motive; they think to scare our syndicate and our promoters from furnishing the necessary capital to carry out our enterprise, and combat, as they say, our nefarious schemes—and that is another purpose. The busy avenues of the press are kept at work, and the entire *claque* of fifteen horse railroads that are, and hope to be, are kept at work circulating through every possible means in the city, squatting in every alley, whispering in every avenue of approach, the terrible suggested difficulties of our legal situation, and that the Cable Company will never come to anything on

account of legal corporate incapacity or something of that sort. Some of our opponents believe it. They went to the General Term of the Supreme Court the other day about it, and immediately this Commission had to stop its session, and five weeks were spent to get the solemn judgment of that Court as to what there was in those objections. The Court has sent them back here and directed you to proceed. The Court declared its intention to take care of those objections. It had taken care of them when it appointed you, for all the questions had been discussed before the Court in solemn argument by Mr. Evarts, Mr. Sewell and myself, and they knew every one of those objections when this Commission was created, and yet they created you.

Would the Court do a vain thing? Are you at liberty to suppose that the Court, with full knowledge of all these objections, would grant you the commission it has given, to sit and to hear and determine this momentous question of intramural transit, if it had doubt of its ability to constitute you a Commission to pass upon the question and inquiry it has confided to your judgment?

Of course not. Now I have addressed myself particularly to this consideration, not because I care whether you propose to consider the law questions or not, but because I do not intend——

Mr. WAGSTAFF—I am utterly opposed to cable, street or surface roads running in Wall street affecting my client's interest, and I am not interested in any way in any corporation.

Mr. SHAW—I have stated that you were an officer of Mr. Conover's Forty-second Street and Manhattanville horse railroad. I do not withdraw that statement. You may not be vice-president now, as you once were, of that company, but you are, to day, an officer of that corporation. The friend at my side tells me that you are secretary. I challenge you to deny that you are secretary or treasurer of that corporation. I observe no denial comes, and it will not come, for the fact is a fact.

Now, Gentlemen of the Commission, while, as I said, I might not care what may be your views about the law of the case, I want to remove from the mind of the Commission any lingering doubt they may have that their work will prove abortive by reason of any supposed defect in the Articles of Association or of any defect in proceedings of the Rapid Transit Commission.

Now I propose to take up these criticisms upon the proceedings of the Mayor's Cable Railway Commissioners *seriatim*.

Mr. Hand charged, that with undue and indecent haste that Commission had passed our routes. I answer: Let any man on earth dispute me if he dare! The Commissioners were sworn into office on the 1st day of December, 1883, they took thirteen days to organize; on the 14th day of December, after wide advertisement in the newspapers, they met in the largest and most commodious rooms in the Fifth Avenue Hotel, and I think perhaps five hundred millions of property were represented in those parlors. The Commission was addressed by William P. Shinn, Gen. Viele, the Hon. Wm. Dorsheimer, Robert Sewell, Simeon E. Church, and several others. There is a report of their speeches extant; I have handed to these Commissioners a printed copy of those speeches. I wish them to be regarded as a part of my argument. These speeches were utterances of men of prominence, not unacquainted with the whole question of our intramural transit. You will find Gov. Dorsheimer's speech very instructive. After the speeches were made, the Chairman made this very sensible observation: "The question of *necessity* may perhaps to some extent at least be governed by the locality in which it is proposed that additional facilities should be furnished." Gen. Viele, on request, then stated that at some future time he would furnish additional information as to the routes upon which cable roads ought to be constructed, whenever the Commissioners should be ready to hear his views on the subject. "We shall be glad to hear them," said the Commissioners. Gen. Viele said he would be ready at any time. The Chairman of the Commission then said: "We shall be ready to hear you, but the question of *necessity* will be governed by locality."

The National Cable Railway Company then presented their plans and invited the Commissioners to go to Chicago to examine the Cable Road in operation there. The invitation embraced fifty citizens, public men, to go and make an examination of that system, and the trip *was made*, and they had an investigation. Within sixty days after organization they laid out the system now before you. It may be called Gen. Viele's system. Within ninety days, and not an hour before the mid-

night clock struck the hand of those ninety days, did they furnish their plans. Then, within one hundred and twenty days their Articles of Association, as required by statute, were ready, just at the expiration of that one hundred and twenty days; not a day sooner, not a day later. Then arose the statutory period within which advertisements for subscriptions should be made, and the *last* day named in the Statute was the day upon which the subscription books were opened, and opened in a conspicuous bank, in a public thoroughfare, at the corner of Wall and Broad streets, the Mills Building. There, following precisely the form—our minutes read alike—our subscriptions were taken as they were taken in the Elevated railway proceeding. We followed the method of organization adopted by the Elevated Railway corporators, which required a ratification of ten days, and the whole ten days were occupied in that one thing, and then they were organized. Then came the final day to file the affidavit that these things had been done, which could be in five days, and on the fifth day, which was on the 21st day of April, 1884, that thing was done, and on the 22d day of April, and not a day sooner, and not a day later than the statute authorized, the articles were filed in the office of the Secretary of State, and in the office of the clerk of this county, and thereupon, by STATUTE, the Cable Railway Company became a corporation.

Who shall say there was indecent haste? Where is this slanderer that dares say this thing? This is the sort of thing that has been said; this is the sort of falsehood that has been uttered against our corporation from the very beginning. We attempted to secure franchises for the cable system with indecent haste! It began during the sessions of the Rapid Transit Commission. These horse railroad people have furnished the views for the objectors, but there is the culprit (pointing to Assistant Corporation Counsel Wickes), who from the City Treasury has furnished all the sinews for the purposes of the objectors before this Commission.

Now let us see who can attack us, who has a right to speak upon this subject anyway, whether we are a corporation or whether we are not. In the elevated railway cases objectors raised the

same objections that we are confronting here. They said there is a spot in the heel of Achilles where the fatal poison that destroys you may be injected, and we plant our barb there. This same question arose in the elevated railroad case. Judge Earl disposes of it in his opinion, which has been so frequently referred to by the seventeen horse-railroad lawyers who have appeared here before you against me. The petitioner has complied with every condition required by the statute. All the kings' horses and all the kings men can't change the determination made everlastingly and finally by the Court of Appeals as fixed and determined by the opinion of Judge Earl.

So that we may say that there is a fixed, irreversible, unqualified decision upon this question, and these objectors will not be allowed to speak on this question at General Term if your report gets there, nor in the Court of Appeals. These objectors to our corporate capacity are busy-bodies. Whom can they speak to? Where is the tribunal to give them audience? You can't. This Commission can't. The General Term of the Supreme Court from whom you derive your existence can't. The Court of Appeals can't hear their contention without absolute stultification. The utter feebleness of their power of contention is disclosed in the opinion of Judge Earl, and it is the childishness of foolishness to contend against me on this question of our corporate capacity. Where can they go with their story, if they have one? There are but two places, one is the Legislature; the other is the Attorney-General. To those two places alone can they pour out their eloquent and industrious defamations against the corporate capacity of the petitioner. And when they get these as their conduit, then we may be obliged to hear their feeble piping, but not till then.

Now, who incorporated us? My friend, Mr. Trull, told you yesterday that he would make a startling proposition. This proposition was one of annihilation, said he, arising from the fact that the men who made us, the Commissioners, did not proceed rightly. Now, my proposition is that we were made by the Legislature. Such was the power of the Cable Rapid Transit Commissioners, that when they gave us those articles of incorporation, they were given to us as though they had then and

there been the Act of the Legislature itself. I would as lief have the Company's charter in its present form, as if I had it from the Legislature, endowed with all competence to give it, and found archived in the office of the Secretary of State. Now let us see if that is so. In this much quoted decision of Judge Earl, the objection was raised that these Rapid Transit Commissioners were accredited with legislative powers which, under the Constitution could not be deputed; to that objection, the Court of Appeals in this opinion of the Court, made this answer: "Corporations organized under the act derive their franchises from the Legislature, and in no proper sense from the Commissioners." I think that settles our *status* as a corporation as emanating directly from the will of the people as represented in Senate and Assembly. Now against this majestic corporation, clothed with all the grand and beneficent powers we claim for it, what is urged? Why, they urge that our corporation can't undertake, as a legal personality, the construction of the railways we seek for, for the reason that there are statutory objections in the way.

This decision is to be found in the 70th New York Reports. It covers and conveys the deliberate resolution of the last Court on earth that can pass on this question. It is a great and overwhelming and indisputable thing.

Chairman PELTON—Would you state where the passage is to which you refer, in the opinion of Justice Earl?

Mr. SHAW—Yes, sir; readily. I have it here. I read it to you. Take the book. In 70th N. Y., p. 338, you will find this:

"But a cause of forfeiture cannot be taken advantage of or
 "enforced against a corporation collaterally or incidentally, or in
 "any other mode than by a direct proceeding for that purpose
 "against the corporation; and the government creating the cor-
 "poration can alone institute the proceeding; and it can waive
 "a forfeiture, and this it can do expressly or by legislative acts
 "recognizing the continued existence of the corporation."

A corporation, which is an artificial person, cannot vocally say "*I am*." A living, actual, natural person can say, "*I am—I know I exist;*" and all the philosophy of all the ages can't dispute that.

But lawyers may come into court and get the judgment of judges about the existence of a corporation. In this decision of the last court that can pronounce on such a question, our corporate entity is declared. It is almost a metaphysical question whether a fellow finds whether he is himself or another fellow, whether he exists or whether he don't exist. This question of our corporate capacity is one of that sort of questions presented here.

Well, we say, the Attorney General or the Legislature are alone accredited with the right to make an inquiry of this sort. Our seventeen horse railroad objectors may conclude their chase right here. The decision of the Court of Appeals ends their objection. Where are we then? We are a valid corporation, SURE. No power of defamation, no force of calumny can dispute this.

Now, what are these statutory objections urged against us? Let us consider every one of them, one by one. This is not the first forum in which they have been stated. They have been stated at the Special Term of the Supreme Court. They have been four times stated at the General Term of the Supreme Court. That same General Term from which you derive your authority to sit as Commissioners on this inquiry. And from none of these Courts, to be Websterian, I may say, have they received the "cold respect of a passing glance."

Well, now, let us look at the objections. The present movement of my argument relates to this. Let us have all the arrows of their quiver of objections.

Well, my friend Trull, sticks his first straw, which he thinks is an arrow, but which is no arrow at all, on this: I read from Section Four of the Rapid Transit Act. This Section reads that the Commissioners shall "fix and determine the route or routes "for such steam railway or railways, and the said Commissioners "shall have the *exclusive* power to *locate* the route or routes of "such railway or railways, over, under, through or across the "streets, avenues, places or lands in such county."

My friend Trull, and all his sixteen horse-railroad coadjutors, stand behind this straw to exhaust the power of his great catapult, and give effect to it. Well, it's only a straw after all. Let us see what it is. My friend, Mr. Trull, sticks his first straw into

our heel with the word "location," which he says means whether our road is to be located *above* the street, or located *beneath* the street. Now he says the word "location" refers to the altitude or depression of the structure, its relative position with reference to the surface of the street, while "route" means the line proposed, and "location" means the places on that line in which the route is to be built. The collocation of the words in the statute is so clear, and the use of the words—they are phrases so familiar to the ear that I do not wonder that the Chairman of the Committee said, as Mr. Trull was speaking, "It may be that you are right, Mr. Trull, but hitherto I had not thought so."

Now, let us see what the Mayor's Elevated Railroad Commissioners thought on that subject. The question came up on the opinions of Mr. Lowrey, Mr. Stephen P. Nash, and Mr. Harris, and that most careful and astute lawyer, George W. Van Sicken, and in those opinions occurs this expression: "I am of opinion that the phrases '*fixed or determined the route or routes*,' and '*locating the route or routes*' are one and the same thing; that the Legislature first say that they have sixty days after the organization to fix and determine the route or routes, and then, that no possible question may arise, the Legislature simply added that you shall have the *exclusive* power to locate the route or routes."

It is on that *exclusive* power that my question with my friend Trull occurs. I hold his railroad corporation's bond, I mean the Forty-second Street and Manhattanville Company's bond, that they will get out of Forty-second street, when our right accrues, by legal process, for they got there when the *exclusive* right to apply for and obtain it was ours, and we brought an injunction suit to restrain them, based upon that right; but proceedings were had and amicable arrangements made by which we took his corporation's bond that will give us damage when the king gets ready to ask for his own.

MR. TRULL—I beg to inform the Commission that in those litigations the Court decided you had no right there.

MR. SHAW—What Court do you refer to?

MR. TRULL—The Court of Common Pleas, at Special Term. Judge Joseph F. Daly decided substantially that your corporation was invalid, and afterwards, upon solemn argument the General Term of that Court sustained his decision.

MR. SHAW—Yes; I know it. Judge Joseph F. Daly, of that Court, did give an opinion quite decidedly to that effect, and the General Term of that Court did indorse it. What else could I expect from a notoriously horse-railroad Court, with John M. Scribner, Nelson J. Waterbury, and my delightful friend, Mr. Trull, against me? The resolution of the Court could have been anticipated. It was the childishness of foolishness to have had any other anticipation. But where did the decision leave the Court? There stands the decision in the 70th of New York, which I have quoted. It was put upon our brief before the Court of Common Pleas. It was argued with all the strenuous force of counsel. It was never lost sight of. Pressed, urged, contended for. No one can deny this. I have the briefs here in print. If the Court or the counsel takes any delight in such a decision as that, let them enjoy the ugly felicity.

MR. TRULL—Mr. Shaw, you are likely to be committed for contempt, in speaking in the manner you do, of the Court of Common Pleas.

MR. SHAW—In view of that danger, it may be prudent to qualify my remarks. I spoke of the Court as a "horse-railroad Court." To be precisely accurate, and to make sure of the particular situation, I ought to have said, in view of the fact that you are running bob-tail cars on one of our routes—the Forty-second street route—I ought to have said that the Court was a *one*-horse-railroad Court. You can't commit me on that, because it is an absolute verity.

I also notice that my astute friend, Mr. Trull, did not make any point on those Common Pleas decisions in his argument, for I know his need of the authority in 70th N. Y. Reports to carry on some of his outside operations; he has furtively put those opinions of the Court of Common Pleas before you without presenting them to me to be challenged. I rejoice that

the substance of them is now before you. I intended to challenge them when they came, as I expected they would. Now, those opinions were laid before the General Term of the Supreme Court that appointed you; they were there cited, discussed and dismissed, and following immediately thereafter with all that discussion before the Court, and that opinion being forced upon its attention, it was held that the situation was complete to ask for a commission to review the proceedings of the Cable Rapid Transit Commissioners. And you, gentlemen of this Commission, were appointed to that end.

Now, Mr. Cozans, in his argument yesterday, laid much stress upon the proviso in our Articles of Association attached to each one of our routes—a proviso in form, precisely the same that was attached by the Elevated Railroad Commissioners to all of their routes. Mr. Cozans will not complain that I do him injustice if I say that the substance of his argument lay in his criticism upon our corporate capacity on account of that proviso. Here it is as it stands upon our Articles (page 129), and as it stands in the articles of the Elevated Roads (page 332). And yet, as Mr. Cozans contends, with that much vaunted fatal proviso in it—with its nullifying force and effect, so dwelt upon by Mr. Cozans, the Court of Appeals did not think enough of it, in deciding the Elevated Railroad case, to speak of it in their opinion. The proviso provides for crossing streets prohibited by statute. The Mayor's Elevated Railway Commissioners took the same view of their duty that the Mayor's Cable Commissioners have taken of theirs. Both Commissions laid out routes to complete a system that crossed prohibited streets. The Elevated Commissioners laid a surface railroad that crossed another street steam-railroad at grade just as we have done—the Hudson River Railroad—and everlasting changes were rung in the Supreme Court and in the Court of Appeals upon this rape upon the law, as it was called; and yet, the Court of Appeals permitted the ravishment and did not notice it. It may strike our opponents as a remarkable coincidence that the Mayor's *Cable* Commissioners did always, except in a single instance, just what the Mayor's Elevated Commissioners had done and which the Court of Appeals had approved. But to one who values judicial precedents—*stare*

decisis, there can't be any wonder about it. The path had been trodden before—was well worn, and was religiously followed.

But finally, Mr. Wickes, who says he represents the Mayor, Aldermen, and Commonality of the City of New York (but who fails to present his credentials and Mr. Cozans, Mr. Trull, Mr. Coudert, and the whole array you have had before you, declare that we are going to destroy their clients on the subject of stations. "Where are you going to put your stations?" say they. "You have not fixed them. How," say they, "do the people know how they are going to approach your railroad, whether they want to use it or not, if the stations are not located precisely with respect to their houses? Why," say they, "this power of locating stations has been left to the volition of this gigantic, remorseless, insatiable and irresponsible cable corporation."

They speak of this as a great crime. Very well; the elevated railroad people took their charter under precisely similar conditions. I give the clause of granting power of the Elevated Railroad Company. I read from page 341 of the Proceedings of the Elevated Railway Commissioners: "Authority is given for the construction of such supports," * * * "stations," * * * "in the locations determined by the Commissioners as shall be proper for the purpose of rapid transit railways and as shall be necessary to meet the requirements of the traveling public." That is all there is in it, and we have prescribed in the same verbiage, and the Court of Appeals did not call that an invalid corporation, neither will they call ours an invalid corporation on that account.

We have but very little to do with the question of stations so far as our surface line is concerned, except the terminal stations. The argument cannot apply to us so far as our surface line is concerned. But as to the elevated lines, the language applies precisely as the language is adopted by the old Elevated Rapid Transit Commission.

But my friend, Mr. Trull, tells us there has been an adjudication of that matter in the case of *Mattlage* against the New York Elevated Railroad Company, which has made it *res adjudicata*, and fatally destructive to us. He exerted all his dynamitic

earnestness to say this. There was his uplifted arm. There was his emphatic forefinger. I see them now. I looked up the case, and I found that the fact was that the New York Elevated Railroad Company, which is now mansarded in common with the Metropolitan Company by the Manhattan Railway Company, had a charter that had been in operation under a law passed—a special act—long prior to the Act of 1875, which allowed it to put its stations within the street upon which its line was located by statute, *and not elsewhere*, but that at the corner of Warren and Greenwich streets they threw a station out into Warren, in violation of the powers created by statutory charter, and when the attention of the Court was called to the subject, that ruling was made, but it was not made against the Manhattan Railway Company—it could not have been made against it; it was not in existence when the wrong transpired; but it was made against the New York Elevated Railroad Company for acts that it did independently of its being a part of the Manhattan Railway system, which made no provision in the matter and never professed to have the right to take anything more than the statute had given the New York Elevated Railroad Company. So much for *THAT res adjudicata*. How does my friend Trull feel over this exposition! He quoted the Matlage case as though I could not answer it. Is there any doubt about his discomfiture? Let us pass on.

But Mr. Wickes comes here with the authority, and by direction, as he says, of the Corporation Counsel, and he says, “I have got an objection that no man can answer.” An objection that will estop and conclude our Cable Company forever. He, of course, has no right here. I deny it utterly, absolutely. But what is his objection? For we must know if there is any spot of attack in our corporate rights. What does he say? Why he says this: The clause in the Rapid Transit Act that requires a forfeiture to the Board of Supervisors has not been complied with, for the reason that we are to forfeit only that portion of our line that we fail to construct within the time limited for its construction. This clause reads as follows: “Section 7. The said commissioners shall prepare appropriate articles of association,” * * * “which” * * * “shall provide for the release and forfeiture, to

the *Supervisors* of the county, of all rights and franchises acquired by such corporation in case such railway or railways shall not be completed within the time and upon the conditions therein provided." * * *

Well, this provision was put into an act, passed in the year 1875. In the year 1870 the Board of Supervisors was abolished (chapter 190, Laws of 1870). So, therefore, you see that the elevated railroads, built under the Act of 1875, which contains this clause, were subjected to this scheme of forfeiture. Were they forfeited? They didn't build all the roads they were authorized to build. They built only two, and they were authorized to build twenty-five. Does anybody appear here to say that because they built only two instead of twenty-five—because they builded only elevated and omitted the construction of *surface* lines, that the whole elevated system of the city can be destroyed on a sham objection of the character presented here? We followed in that clause precisely as had been done before in the elevated railways I have alluded to—the precise language of the old Rapid Transit Commission. But what Mr. Wickes meant, and how he came to throw out a dark insinuation that there was something mysterious about that provision, I could not at once, when he made his objection, well determine, and I have been looking up that subject. This is his suggestion. There was not any Board of Supervisors in 1875 when this Rapid Transit Act was passed. The Board, it seems, had been abolished in 1870 (chapter 190 of the Laws of 1870). Well, what is the effect of that? That we are to forfeit to a nonentity, to a nothing that cannot take—why, it is a vain clause and amounts to nothing, and you might as well have written in that statute that the forfeit should be to the Khan of Harlem as to the Supervisors of New York, or written it on water. This, I cannot doubt, is a complete answer. Forfeitures being odious in the law, are contemptuously kicked out of every court of justice where there is any attempt to enforce them unless there is the most stable and necessary ground for them. A brand of shame is put upon their brow, and they are accounted odious. The Court of Appeals had that question before them, and they paid no attention to it.

But supposing that it should be said, although it has not

been said or suggested, that by the doctrine of *ci-pres*, the Board of Aldermen, acting as a Board of Supervisors, might take it. Well, to that we say the provision is statutory, and the statute will exert its own enforcement. We took our charter subject to that clause, whether it is in our Articles of Association or not; whatever it may be, it can be enforced against us by whoever has the right and wherever there is the right. The statute is a part of our charter. I suppose you are looking solely to gain for the public the services we propose. I suppose you don't care whether those services are furnished by our corporation, and are as willing they should be furnished by the supervisors of this county. If that be your state of mind, the statute, on which I am commenting, provides for that precise contingency.

MR. TRULL—You don't contend that the statute does not require you to provide in your Articles of Association for that?

MR. SHAW—I do not contend about it at all. But I do know that whether or not they contain provisions for the protection of the city, the statute will protect it, irrespective of any stipulation or matter in our Articles. The statutory clause is there. Our corporation must abide by it whatever it be. Its presence or absence in our Articles of Association neither makes nor breaks us. You can't assail our corporate life on any such ground as that. It's our corporate life you are after. You expect to take it if you can find verbal or technical inaccuracies or omissions in our Articles of Association. There is nothing of the sort either omitted or included, as I will presently show you, in those Articles. But you must yield up the illusion that you and all with you—all the seventeen orators to whom I am replying, can even meddle with that life—Whet your daggers. Distill your poisons. Load your pistols. Against you all, ours is a charmed life. You have not legal capacity to harm us.

Now, again, Mr. Trull says, "but if all these objections fail, we have got you for a *defect* in plans." Well, our plans are a precise copy of the elevated railroad plans, except in one particular, and in that particular only the slightest "flexibility," sanctioned in the Elevated Railroad matter by the General Term of the Supreme Court, was indulged in. My friends, the enemy,

have made one fatal blunder in the whole line of their opposition. It is this: They have regarded the constitutional amendment of 1875 as giving PROPERTY rights to abutting owners and to municipal authorities on streets for railroad services. Hence they say: A railroad grant involves *private* property rights, and therefore statutory proceedings under the Rapid Transit Act must be strictly pursued. Nothing of the sort. No *proprietary* right was created by the amendment. All was merely *administrative* to promote public services. Wherever this occurs in a public statute all the King's horses and all the King's men are powerless to help technical irregularity and omissions. No statute was ever drawn on such a question that left the Court without *discretion* and power to protect society. The Legislature expects it. The Court exercises it. It is a singular fact that the questions of the *alternatives* allowed to us by our Articles of Association were quoted from the Articles of Association of the Elevated Company. It had the same alternative to build surface or elevated railroads that we are allowed by our articles. Has the Court of Appeals ever found that the elevated corporations were void because they contained a provision to that effect? I will leave this discussion here for to-day, and to-morrow I will take up the *plans* for the *surface* road and finish with such expedition as I can.

The Commission then adjourned to eleven o'clock on Thursday, July 2, 1885.

The Commission convened at 11 o'clock on the 2d of July, 1885, when Mr. Shaw continued:

If the Commission please, I concluded our presentation yesterday by a consideration of some criticisms of our opponents, or the objectors, upon our Articles of Association which they said were defective, and being defective, destroyed our corporate entity, because, among other things, our plans are not specified. I showed you, on the authority of the Court of last resort, that these objectors could not question our corporate capacity. Whatever may be in doubt, that is an indisputable verity. Well, then, our corporate capacity must be conceded. But, say our opponents, though we have the clearest corporate capacity,

still, as a corporation, we are not legally qualified to build these roads, by reason of the defect in plans prescribed by our charter amounting to an inhibition to our construction of these roads. Let us see about this. We have to build two sorts of railroads, one elevated and the other surface. I showed you that the plans for our elevated road were precisely in conformity with the plans adopted by the Rapid Transit Commissioners that gave to the city our elevated roads, and that they had been approved by the Courts.

I now come to the subject of plans for the surface portion of our route, which is the main part of our system. The objectors say you have not made and described definite plans for these surface railroads. They have said it to you, they have said it to the General Term, and we have answered them there, and the General Term felt it was your duty to go on, and have in substance said the answer is complete. I will answer it to you, and the best way to answer it is to read you the answer we made to the General Term when that complaint was made. I give you that answer from our printed brief. So far as the indefiniteness of the specifications is concerned, the plans are quite as specific as those of the Elevated Railroads, which were approved by the Court. There must be some flexibility in these respects. It is not to be expected that working drawings should be prescribed by the Rapid Transit Commissioners Mayor Edson gave us. This the Court declared when passing upon the plans of the Elevated Railways. My associate, Mr. Wheeler, who was one of those Commissioners, has taken great pains to lay before you the precise text of the opinion of the Court on this subject of plans. This opinion, as he explained to you, may be found in an abbreviated and imperfect form in the 7th of Hun, page 241.

There is a limit to your patience and a limit to my endurance, and I can't go over this matter again; but you will not fail to note what Mr. Wheeler so thoroughly emphasized, using the language of the Court, that "flexibility" must be an incident in this matter of plans, which should govern unforeseen considerations of physical necessity that might arise in the construction of the railways.

Now, as to the surface roads, there can be no more definite

description of a surface cable road than that given in our Articles of Association, namely, "according to the most approved plan of cable traction as operated in San Francisco and Chicago." The cable roads of those cities are of world-wide repute, and may be considered as a conspicuous working model. This method of description has been sanctioned by the Legislatures in the charters of nearly all of our horse railroads, which uniformly, by the acts of the Legislature, are required to be built "*according to the most approved plan of horse street railroads.*" Charter after charter of these horse-rail-road objectors who are making clamor about our plans, contain this very phrase. Now what more can they want? If I had a model in this room and could exhibit the mechanical contrivances of how we could work practically a surface road by cable process, why that would answer the statute according to their notion; but there is the City of Chicago, notwithstanding our city's expert, Mr. McKay, who in his affidavit describes it as a deserted village with the grass growing in its streets and no enterprise, no industry and no business, for which my friend, Mr. Wickes, apologized and said Mr. McKay did mistake himself a little at that point.

Mr. WICKES—When did I say that?

Mr. SHAW—In your argument. Dare you say you didn't? You don't deny it. The stenographer's minutes can be referred to. Of course Mr. McKay mistook himself, just as Mr. Crowley did, just as Mr. Birdsall and Mrs. Twitchell and the rest of the city experts have done; this veracious looseness, or rather the loose veraciousness, of all the city experts, and there are no other experts here, seems to characterize all these statements; our working model is in the City of Chicago, the very centre of the business activity of two-thirds of this country (looking at the map on the wall hung there by Mr. Wickes).

The CHAIRMAN—Do you refer to that as an exhibit?

Mr. SHAW—I am glancing on the map that all the newspapers have seen and commented upon, and which Mr. Wickes has placed upon your walls. Forty railroads center in Chicago. It stands

audaciously rivaling in its pretensions our own great imperial city ; and yet McKay says that grass is growing there. I have read his testimony carefully. He is Mr. Wickes' principal expert witness. I derive from his testimony that there is no such city on earth as the City of Chicago. That such a city once existed, but was destroyed by a cable railroad. That after this calamity historians have uniformly spoken of Chicago as *Atlantis*. That before the advent of cable railroads Chicago was looked upon as an important provincial town, but cable roads destroyed it. *Troja fuit.*

Now, what am I to do with such testimony as this ! There is Chicago. Look at the queen of cities ! Don't crowd me to give you epithets to compliment her ! She stands there. She stretches her jeweled fingers to the North, to the South, to the East and to the West—not to beckon, but to acknowledge compliments to her consequence. Into her lap the resources of this hemisphere are poured in gems of sparkling showers that rival all our dreams of the exhaustless Inde. A cable road has been built there and there are twenty miles of it, ten of double track, and it is on the south side of the city, and it is a part of eighty-seven miles of railway. The rolling prairie is on the west and north of the Chicago river. The vast acres of Cook County are put upon this sheet on the wall to show where Chicago is ; and everybody knows that on the south side of that river lies Chicago ; and there where that cable railroad is is its custom-house, its post-office, its great hotels, the very centre of its energy, the very heart and core of its life ; the rest is suburban. Is this map put before us and to be argued about as a fraud and cheat in aid of this Sterling testimony to which we have been treated ? The most considerable of the city with all its activity is there. What does that railroad do ? It carries 150,000 passengers daily or 55,000,000 or more a year. Look at this great fact, and keep looking at it. It carries the largest number of passengers of any street surface railroad beneath the sun ; that is the model upon which our road is based. Look at it. That map reminds me of a map I saw once in Norway. There I saw a map of the United States and the British Dominions of North America, and in the lower corner of it a little bit, a fragment of the map represented

the United States; and Canada was put in glaring colors, and large almost as the globe itself. That was to invite immigration to her colonial dependency by the policy of the British government. And on that map our own great Republic, with its 55,000,000 population, looked like an insignificant speck, and Canada looked as though it was the regal domain of a Sesostrius. I regret I have not at my hand a map of the City of San Francisco; but they have some ten or twelve railways in that city, seven of which are operated by the cable, five of which have been converted from horse tramways to a cable railway. (Here Mr. Shaw's assistant handed him a map of San Francisco.) Look at that map (handing map to Commissioners), exaggerate its proportions in your mind's eye, so as to relatively correspond to that map on the wall (pointing to the large Chicago map introduced by the Corporation Counsel). San Francisco would show a railroad system almost as small and insignificant as it is on that Chicago map.

Now it turns out that in San Francisco, according to the statistics put upon this map, the seven cable roads they have there cover the most important part of the whole city; and it also turns out that the property along the line of each cable route has increased in value by reason of these cable roads. That there has been an immense increment of value, while the property along the lines of the roads that are not cable, has depreciated. It is shown in our proofs that the conversion of the horse railroads to cable roads has made unpaying horse railways profitable, because when cabled they have attracted traffic, and thereby given values to property. Their cable roads are paying and stand like gas stock in this city, the first and foremost property investment. Property along the lines of the horse roads, which do not pay, has depreciated. That lithograph (pointing to large sheet on the wall) is the return from the municipal authorities of the City of San Francisco. It is authenticated by the Mayor and the City Assessor of San Francisco, and shows the beneficial effects of this cable system. This system has been in operation there ten or eleven years, and the world has known of it and the citizens have been proud of it, as the citizens of Chicago are proud of their cable roads; it is doing the immense work I have spoken of, and it was perfectly proper

for our Mayor's Rapid Transit Commissioners to refer, in their Articles of Association as they did, to a working, acting and practical model for a system of cable roads. Well, that disposes of the criticisms upon the Articles of Association, so far as plans for cable *surface* roads are concerned.

But Mr. Cozans argued that a cable road was not possible, within the meaning of the statute, as not being a steam railroad. What authority has he for that ?

MR. COZANS—The 84 N. Y.

MR. SHAW—I do not need to be coached on that case, for I know it well. Now, the fortieth section of this Rapid Transit Act, which in the running fire that has taken place before the Commission, in discussing the question, illustrates what interpretation ought to be put upon it, provides that this Rapid Transit Act should be known and distinguished from all other acts as a separate system of legislation or of railroad services for cities. That act may or may not be at once its monument and its tomb; but, whatever it is, it is an act all by itself; it is *sui generis*. Contemplate it as unassailable by analogy or by precedent! When these gentlemen who are opposing me can realize this great fact, they may be able to distinguish law propositions which favor them and assail me. Until then, let them keep all their arrows in their quiver. Such provision for railroad services was to be disconnected from all railroad services under the Act of 1850; all railroad services to the public under any private or special charter. It is to stand by itself, to be its own completed self, *sui generis*, without any other connection or contention with any other statute or thing. But in the very belly of the Act, in section 36, the Act did take in two separate corporations which were there as exceptions from the general operation of the Act, and those were the New York Elevated and the Gilbert Elevated Roads. These exceptions were as conspicuous as a lofty mountain on an immense plain, and are distinguished because they stand alone. There they are, dominating figures in this great system of legislation for intramural transit. They have been sanctioned by the authority of all our courts, and are therefore judicially hallowed.

They rise like some tall cliff whose awful form
Swells from the vale and midway leaves the storm.

But, there is Section 40 of this Rapid Transit Act. Look at it! Contemplate it! Don't it tell you that it dominates the entire situation contemplated by the Act, and that Section 36 is but an incident in the general scenery—or field of legislation intended to be created and covered by that Act?

Outside of that this Rapid Transit Act was to stand, and to inaugurate, and be precursor, the foundation of a separate, independent system of legislation for these public services in cities. The Fortieth Section, to which I have alluded—if your Honors will look at it you will see that the result and purpose of that section is that no steam railway company, under the Act of 1850 or any of its amendments, nor any other railroad company by any special legislation, anyway or anyhow, except those railroads that might come in under the Thirty-sixth Section of the Act, should have any consideration or recognition under this act. That, I think, you will find is clear. I say you will find it clear. Well, it is clear. But that Act of 1875 was a General Act. It provided for precise conditions. Through its narrow gateway a well-advised, decorous corporate procession like ours might pass, and enter into the enjoyment of the powers and privileges it confers. Our corporation has passed through that gateway. That you now understand.

That Rapid Transit Act is popularly supposed to have been drawn, probably was drawn by the master hand of Governor Tilden; at all events it is known that his private secretary bore it to the Speaker of the House, who left his seat and went upon the floor of the House of Assembly to introduce it, and it was passed under the auspices of Mr. Tilden, who was then Governor; there is no doubt of this; and it was universally said he drew the Act. He drew it, as has been charged in the briefs quoted by our adversaries in the Court of Appeals, as a shrewd and crafty measure to save the Gilbert Elevated and the New York Elevated Companies' charters, and hence section 36. All the rest of the Act was a public act, and belongs of right to any competent combination of citizens who may publicly and openly invoke its powers. We draw the veil here. We don't know, or profess to know what Governor Tilden did; but we do know that that Act is a general Act, and that our method of procedure has adequate vigor under it.

Now, we stand on this Rapid Transit Act, cut loose from all other Acts. Mr. Cozans seems to misconceive, and I noticed my friend Mr. Trull, and Mr. Coudert and Mr. Hand also misconceive the effect of that section 40 of the Rapid Transit Act. But we are indubitably within the narrow limit of that Act, and all decisions and all authorities under other Acts are inapplicable to this Act. Counselor Cozans cites the case from the 84th N. Y., which was a case which arose under the General Railway Laws of the State, and not under the Rapid Transit Act. That answers him, and answers him fully.

MR. COZANS — That decision was rendered under a Special Act.

MR. SHAW—General Act, or Special Act, it does not make any difference. It was not the Rapid Transit Act. This Rapid Transit Act under which our rights accrue, says, subdivision 4, section 26, that we may have any motor other than animal power. I give you the subdivision, and ever after let there be no question about it.

“ SEC. 26, Sub. 4. To take and convey persons and property on their railroad by the power or force of steam, or by any motor other than animal power, and to receive compensation therefor.”

I cannot inquire what the Courts may say about some other cases under some separate and independent system of railroad legislation, but under this system of railroad legislation they have said in that subdivision, section 26, that our motive power may be any motive power other than animal.

(Recess taken for twenty minutes.)

MR. SHAW, resuming, said :

The most formidable criticism made upon our Articles of Association goes to our corporate capacity to lay out surface railroads across town. Mr. Trull and Mr. Cozans have been very careful to call your attention to the fact that the act provides that we shall not cross steam railways at grade, and they charged the Mayor's Commissioners that gave us our charter with a deliberate violation of the law because we had crossed the Hudson River Rail-

road at grade. In the charge, and in the allusion to section 4 of the Rapid Transit Statute, they settled once and forever any doubt that should be upon your mind as to the meaning of the words "over," "through," "under," "across." In the opinions of counsel, which are the opinions that the Rapid Transit Commissioners who gave us these Articles of Association solicited and obtained, this matter is unfolded with conspicuous definiteness.

Among those opinions which I have laid before you, you will find the opinion of Mr. Develin. That opinion calls attention to that very point, and is made the basis, with several comments in undoubted confidence that the statute authorizes a surface cable railroad. Mr. Wheeler H. Peckham also gives us an opinion on that question.

The CHAIRMAN—Upon that question?

Mr. SHAW—Yes, sir; and on that question alone. Ex-Judge Leonard has an opinion on that question of law; Mr. Evarts has an opinion on that question; Mr. Loomis elaborately considers it; and I had the honor to offer an opinion on that subject. I was the counsel to the Cable Commission, on whose work you are sitting in review. It was not without fear and trembling that I considered almost every question that Commission had to pass upon, but this question was the least embarrassing of all; for I knew, a mere child could know, who had capacity to consult a dictionary, that cable surface roads could be built under the act. The Elevated Railway Commissioners, whose action has been approved by every court, had no doubt about that right. They laid out routes on the surface. The act being a public act, and applicable to all the State, and, as was with great force stated by Mr. Church yesterday, not available to any other city except Brooklyn and New York, unless it could furnish surface railroads. Brooklyn might have an elevated or an underground railway, New York might have an elevated or underground railway, but no city, except these cities, within the whole State, could practically avail themselves of this act which is to provide steam transit facilities for counties of the State unless surface roads could be built. Let there be no mistake about this. I say that unless surface roads can be built under that act anywhere in

the State, it is not a general act, and that it is a fraud and a scandal to our Legislature and to our courts. Such a thought would horrify civilization. You have been to Albany, you have clambered that steep hill—and you know it is so painful to reach the Capitol from the depot—to see those horses struggling, that you prefer always to walk. They are about cabling those cars; they have contracts to cable them with our corporation. The Rapid Transit Act is available to do that. It is just so in Ithaca; it is so in Kingston; it is so in Newburgh; it is so in Poughkeepsie. All over the spirit of cabling is going on, and if the system could not be applied to the surface, why the act would not be available to any city except the two cities of New York and Brooklyn.

Mr. TRULL—Is it not a fact that the Act of 1884 provides for a cable road?

Mr. SHAW—But it is also a fact that the Act of 1884 was not in being when the Act of 1875 was passed, nor was it in being when these Cable Rapid Transit Commissioners laid out these routes. As to the Act of 1884, I may say to Mr. Trull that provision was put into it for the purpose of destroying our corporation by men who controlled legislation.

Now, it is not necessary for me to argue that proposition further, but you now know how cautiously and carefully the Cable Rapid Transit Commissioners proceeded in laying out this system of routes; what care they took to get the opinions of counsel and have the Statute searched for precedents. They knew what the previous Commission had done in laying out elevated and surface roads; the very form that was laid before that Commission by me was a bond—a mortgage bond of the Metropolitan Elevated Railway Company—that provided on its very face that the security was upon the elevated *and surface* lines of that corporation. Those bonds are traded in by the millions on the street; they are securities for fortunes. That bond was prepared before the railroad was built, and in anticipation of the construction of *surface* roads. The bond was drawn upon the Article that allowed the building of surface roads. The validity of that bond has never been questioned.

I hold, that if there is one clear truth, indisputable, unquestionable in this whole business, it is the right under the Act of 1875 to build surface roads of any variety except those to be operated by animal power, and this Act of 1884 recognizes it. By the very section 16 of that act, which our opponents rely upon to destroy us, it is recognized; for they say that no more surface roads shall be built under chapter 606 of the Laws of 1875, under authority of Commissioners to be appointed under that act. (Here Mr. Shaw read the section.) No more surface roads—no surface roads. There is a very clear recognition in the Statute itself. Now, if the Commission please, we had great debate on this question in Albany before committees of the Legislature, and uniformly in every committee they reported upon our rights, and our right to have surface roads under this Rapid Transit Act of 1875. While with the blare of the bugle and with their provender and their boodle they went to oppose me, they never could defeat or get it out of the head of any committee under the presentations I made, that the power is complete. And when they made their makeshifts and reversed reports of committees, and passed this sixteenth section, they had to recognize this right to surface roads as the Court of Appeals had so recognized in the elevated railway cases. There can be no question about it. But in section eighteen they provide for existing street surface railroad corporations, and they divide them into roads or companies that have a right to build roads that are horse railroads and other roads that are not horse railroads, and what other road is not a horse railroad but our cable road? I clinch the argument there.

I omitted to notice in its proper place the following item: that Route No. 1, when it was located, was merely located without respect to plan. The Commissioners thought that there ought to be a road on Route No. 1 and they adopted the route irrespective of the plan or the way of operating it, and afterwards the plan was fitted to it. It was passed as a desirable route for a railway, irrespective of the method of its operation.

The next criticism that is made on these Articles of Association is, that they do not fix the time with sufficient definiteness within which the railways should be constructed. We claim that the correct interpretation of that article is this, that the time

begins to run from the time we had legal ability to commence the work ; the time of constructing the road is from the time of lifting the first spadeful of earth until we drive the last spike, provided we lift our first spadeful of earth at the moment after we get legal ability to do so. That question was argued by Mr. Trull, on behalf of his railroad company, against myself in the Common Pleas before Mr. Justice Daly, and Justice Daly adopted the view that the time was too fluctuating and that it must necessarily impair the validity of the corporation. His attention called to that sentence or paragraph of Judge Earl's opinion, which I read to the Commission yesterday, that our corporate capacity could not be attacked, incidentally or collaterally, was ignored. He may afford it, but no competent judge could afford it. In a case that this corporation brought in the Supreme Court and argued before the General Term, Mr. Justice Daly's opinion was used for all it was worth. Its full force and effect was poured by counsel upon the Court, and under the pressure of the argument that Mr. Evarts made, no respect was paid to it whatever.

By the CHAIRMAN—Was Judge Daly's decision before the General Term of the Supreme Court—the Court that appointed us ?

Mr. SHAW—Yes, sir ; and immediately upon the conclusion of the argument, or rather after appropriate advisement, this Commission was appointed with all these objections before the Court.

My friend, Mr. Wickes, the Deputy here of the Counsel to the Corporation, requests me to be particular and tell him what was the outcome of the proceeding which he called the Second Avenue case, a proceeding instituted by my corporation against the Second Avenue R. R. Co. There shall be no want of frankness in my disclosures about that. The outcome of this, Mr. Wickes, was, that after Mr. Justice Daly's opinion was fully and at large urged before the Court, this Commission was appointed. With all these objections, that is the definite outcome, but I will be more particular with you.

The CHAIRMAN—Was this Commission appointed on an *ex parte* application ?

Mr. SHAW—Yes, sir.

Mr. WICKES—I referred in my remark to the litigation with the Second Avenue Railroad Co.

Mr. SHAW—I am going to deal with that, you will have it life-size and twice as natural.

Now, I informed the Commission yesterday that the object of the discussion of all these criticisms upon us was not to advise you or argue with you about what your duties are in the premises, whether you are to consider these questions; but to fix in your minds that if you make this report in favor of the petitioner your work will not be a vain one; but there is not a scintilla of doubt but what you will be sustained by precedent, by authority in every court. A gentleman who was present yesterday, with whom I happened to speak about this aspect of the case, said to me, “why the elevated railroads were not built until they went to the Court of Appeals, because these horse railroads raised these questions of the constitutionality of the act and the irregularity of the proceedings of the Rapid Transit Commissioners and of the Court’s Commissioners so that capital could not be found to build them,” and that Cyrus W. Field stepped in under the advice of his brother, David Dudley, shouldered all the questions and put it through, and had to do it alone, single-handed. The object of this attack is manifestly to work out a dissatisfaction among the promoters of our enterprise so as to induce them to withhold their funds; and fifteen horse railroads with their clique, big ones and little ones, worthy ones and unworthy ones, and all the crew, all those who want railroads, franchise hunters, are working and speaking into everybody’s ear the notion and the idea that here is a Commission going on and doing things which are entirely illegal. Why, they hope to frighten capital out of its boots and they hope to frighten you, they hope to frighten the Court out of its propriety almost; and the object of putting these criticisms before you and before the public, is no other and no worthier than a malicious slander of our title.

Do you suppose that I do not know that Mr. Trull knows—and Mr. Trull speaks for all horse railroads in being and all that hope

to be in being—that he cannot incidentally or collaterally attack this corporation? He is too good a lawyer not to know that. Does Mr. Wickes know it? There is not a lawyer that has appeared in this case of so feeble capacity that does not know it. Now I want to clinch the nail beyond all peradventure. We have had this subject considered before the General Term of the Supreme Court recently. It went there on a motion of the horse railroads. For five weeks your work has been suspended and delayed by an injunction order, until the General Term could decide. It is not proper for me to say what the Court have decided, or how I regard that decision. But it is entirely decorous for me to say that the Court dissolved the injunction, and left you to proceed with your business. If I interpret that decision rightly, it is to this effect: You are to complete your work on the basis of deciding upon the physical and economical advantages of our cable system. If there are any law questions involved, that may prove insurmountable to the achievement of that system, the Court will determine regarding them. This seems to be the sense of the decision. If it be so, you are to go on and decide on the questions of physical and economical advantages about our system. I may say farther, the Court is a great one. No human tongue or pen—no human thought has ever questioned its ability or its integrity, nor its sagacity, nor its careful appreciation of any suitor that was ever before it. Do you suppose for one instant that such a court would allow a grave and expensive proceeding like this to go on, if it had serious doubt about its legality?

It is proper that I should state to you that every conceivable objection urged here was urged before that Court. The Court knows those objections and has measured them. If they have conspicuous force, would not the Court have detected it; and would not that great Court have consigned us to a final rest? Some graveyard where one little tomb would bear this inscription:

“ If I was so soon done for,
What was I begun for?”

The cry is to stop us. That's the horse railroad cry. They wanted to stop the Mayor's Rapid Transit Commission who begun

us; they did interfere and they worked it up to such certain extent, that they got new Commissioners. They wanted to stop us at the door of the Legislature. Hence section 16 of the Act of 1884. They have tried to stop us in the courts, and they dread nothing so much as they do to have this thing proceeded with. They know the inevitable doom of the horse railroad interest if we do succeed. This is confirmed by the facts before you. They know they must be brought to the transfer system, to the cable system, to a surrender of these independent short routes for a five-cent fare, and to the merging of the whole of their interests into a grand system for only a five-cent fare. They want it stopped. They want to stop you, and tried to stop you the other day in the General Term, and the General Term did not stop you, and the General Term never will stop you.

Now, they have had all their questions before the Court. Yes, five times it has been before the General Term of the Supreme Court, from which you get your appointments. The fullest and ablest exposition of all objections, including Mr. Justice Daly's objections, and every other objection that could be urged were presented on a brief prepared by John M. Scribner and undoubtedly revised by Mr. Trull. They were heard at the General Term, and thereupon this Commission was appointed. Now they want it stopped—stopped here.

Permit me to say :

“No rogue e'er felt the halter draw
With good opinion of the law.”

They submit these questions to you for confusion. They expect to confuse you so that you will not submit these law questions to the General Term. If they can huggermugger so far as the report of this Commission is concerned with the blandishments of my delightful friend Mr. Trull, they may be saved; but when you have made your report, if favorable, they will not be at the General Term with these stale objections to oppose, but they will take their *boodle men* and hie them to the Aldermanic Chamber and there they will “paint an inch thick.” “Stop it, gentlemen of the Board of Aldermen,” they will say. “Here is our money. Stop it some way and never let it

get into court"—that is their argument. Now, to show you if we do get into court what will be the outcome. If there is anything fundamental in this Rapid Transit Act that may be called its operative and necessary clauses, it is those clauses that fix the period of time within which certain things should be done. Within fifteen days, as the act provides, Commissioners must organize; within thirty days from organization they must declare the necessity for the routes; within sixty days they must lay out routes; within ninety days they must decide upon their plans; within one hundred and twenty days they must make their articles of association. The words are mandatory to do those things. But the Elevated Railroad Commission did not do the sixty-day thing. The sixty days elapsed without certain necessary applications, and Mr. Parsons in arguing that objection, was met with this decisive reply from the General Term. In the opinion of Mr. Justice Daniels occur these words: "The Act of 1875 does not require that the consent rendered essential by the statute, or the report of the commissioners appointed by the General Term, and confirmed by the court should be secured within sixty days. The statute requires simply that the commissioners should, within sixty days after their organization, fix and determine the route or routes for such steam railway or railways" (Laws of 1875, chap. 606, sections 4 and 38). "*In any event*," said the learned Judge, "the time within which a public act is required to be performed is not mandatory, but directory, a literal observance of the direction as to time is not indispensable to the validity of the act."

The CHAIRMAN—What authority do you refer to?

Mr. SHAW—I refer to 7th Hun, p. 241. By a public statute which the Rapid Transit Act was, and is, unless there are special clauses that are of the very essence of the act, and which direct its movement and which are declared to be by the statute itself the very essence of the statute, all those incidents and conditions are called *directory*. I one day carefully enumerated all the things that should be done under the Rapid Transit Act and I found that there were one hundred and eleven stated, specific

things to be done under that act. According to the interpretation of our friends here, if every one of those one hundred and eleven things were not done in the precise manner indicated and prescribed by the statute, according to the most strict construction, that would, on any view the Court might take of the statute, vitiate the whole proceedings. Now that thing in the Elevated Railroad case was not done within the sixty days, as prescribed by the statute, and this authority of the 7th Hun there shows it.

The provision in Section 4 of the Rapid Transit Act, that a certain thing should be done within sixty days, the Court treats as not having been done. I don't know whether it was done or not. I do know that we did that same thing within sixty days. We felt, if we had not done it, that there might be a defect in our corporate capacity, but we did do it. We never ventured upon any such departure as this opinion condones.

Now consider this. The Statute said that a thing should be done within sixty days. This decision of Judge Daniels deals with the question as though it were not done within sixty days. Yet, Mr. Justice Daniels, speaking for the General Term, said that this sixty-day matter was merely *directory*.

If your Honors care to pursue the inquiry, you can read from page 368 to 381 of Sedgwick on Cons. and Stat. Law. There you will find the whole law declared. But it goes so far, and so much further in this State as to excite even the comment of this great elementary writer. On page 377 he says "I may here notice that this same principle has been applied to the interpretation of constitutions. The Constitution of New York provides in regard to all laws that the question upon their final passage shall be taken immediately upon the last reading and the ayes and noes entered in the journal (Cons. Article III., sect. 15,) it has been held in regard to this provision with what, I say it in all deference, appears to me an extreme laxness, that it is merely *directory* and that the disregard of it would have no effect upon the law."

The cases of departure in England from mandates upon municipal bodies—positive mandates of Parliament—are commented on in this work, and it is shown that where a public statute is administered by public officers for a public service the

end in view is the principal matter, and that any departure, even from mandatory features in the statute is to be disregarded. The object and purpose of the statute which is to remedy a public mischief or promote a public service must be effectuated, if it takes all the king's horses and all the king's men to force the judiciary to do it. That disposes of the law and all legal embarrassment about our questions here.

Now that disposes of the question of time, and this argument I have just addressed to you was the argument addressed to the General Term of the Supreme Court on the only serious question our opponents can make, in answer to the decision and opinion of Mr. Justice Daniels.

Mr. TRULL—If I understand your contention you had more than sixty days, and if that be so, how did you happen to advise Mr. Randolph, Mr. Devoe and Mr. Hedden, that they could not change the route after the time had expired.

Mr. SHAW—For the reason that when your horse-railroad people changed the Commission I ceased to be their adviser ; I retired.

The CHAIRMAN—Is there not a better answer ?

Mr. SHAW—Yes ; there is a far better answer. I might well make it, but I choose to state here that I did not advise the reconstructed Commission. "It is long to state but not hard to tell." I did not advise them, so much for the question of time.

Now, a word further on this subject of plans, somehow or other it escaped my attention at the time I was commenting upon that criticism. They cited Mr. Justice Daniels' opinion that came down the other day on the motion about the Boulevard Route. That there was a defect for the want of plans. That same Justice who wrote that opinion on the Elevated Railway case, has recently said that the "irregularities and omissions" in following the statutes—I speak of the application of Mr. Sharp's Broadway railroad—could be very well disregarded ; and there were two fundamental irregularities and omissions in Mr. Sharp's matter. They were these : A notice to the property-owners was prescribed definitely by the Statute, that they desired their con-

sent or refusal for the road. Mr. Sharp failed to give notice. This was an irregularity, an omission touching the very life of Jacob Sharp's railroad, and will, undoubtedly, unless some legislation can cure it, destroy his franchise, as a report from your Commission will destroy Mr. Conover's. We mean war. We mean that these people shall know that their securities have got the taint, the seed of death in them. Mr. Conover has no right to be selling his bonds and distributing his stock to widows and orphans, nor has Jacob Sharp to be distributing his to widows and orphans with this taint upon them, and this danger of their destruction, utter worthlessness staring them in the face. Bombard my finances as these objectors may, I bombard theirs, and with such righteous reason and such indisputable law that I can say that I would not give that (snapping his fingers) for the intrinsic value of a dollar of Conover security, because we have a right in that road.

Another, and the second irregularity, relates to an omission to protect the City. It is, in substance, Mr. Wickes' objection against us here, that the City has not been adequately provided for. The Court quieted its conscience on that question by accepting a stipulation between the Counsel to the Corporation and Jacob Sharp. That stipulation reconciled the Court to an approval of Mr. Sharp's scheme, on the broad principle that technical irregularities and omissions in a matter relating to public services, ought to have no weight with the Court.

But what are we to infer from the fact that such a stipulation was made between the Corporation Counsel and Jacob Sharp? Don't it help us to know that the Corporation Counsel is here in the interest of Jacob Sharp?

Now, these are all the criticisms made upon us. I have reviewed them one by one, and I have incidentally argued all in this case that rests upon them. The whole claque against us is an organized claque. It is as thoroughly Frenchy in its methods of operation as anything that occurs in a Parisian theatre. They are in the Fifth avenue Hotel, in the Hoffman House, in the Brunswick, in all the bar-rooms, around the courts, nursing this doubt about the validity of our charter, and it reminds me, when I hear some of the lawyers that are engaged in disseminat-

ing this opinion, of what I used to encounter in my early days when I was called a politician. I was an abolitionist ; I was an anti-slavery man. I would meet some red-mouthed Irishman who would tell me that this whole abolition business was entirely unconstitutional ; that it was against the principles of Democracy. The lowest gamin that aped democracy thought it was all unconstitutional, and this clique has spread throughout the town that our cable road charter is unconstitutional, illegal, null and void.

Mr. Wheeler dealt with the questions as to the *necessity* of railways on all our routes. He showed you the feasibility of cable roads for such routes. He was disputed. Our routes were denounced as unnecessary and useless, and destructive to property. Our overwhelming testimony was to the effect that wherever a horse railroad might be useful a cable road would be far more useful. When these horse-railroad objectors, right in the heat of this debate, went and filed on all our routes, the William Street Route, the Wall Street Route, the Broad Street Route, the Cortlandt Street Route, the Liberty Street Route, the Lexington Avenue Route, they entered a *cognovit*. There they are, stripped and powerless to make objection. They admit the desirability and feasibility of *horse* roads on these streets. You know that cable roads would be far preferable.

I want to leave this as a controlling lodgment in your minds, and, for I see many reporters here I want to throw, as far as the press can carry it, the challenge that such objections as have been made against us are objections that were raised against the Elevated Railroad Companies, and which were overruled by the Courts. They have been rehabilitated and taken from their graves. These objections were disposed of and consigned to their tombs eternally, and yet they have been brought here and renewed against us in order to produce a distrust in the public mind that some how or other there was an illegality of some sort somewhere that made our charter invalid.

Mr. WICKES—May I ask a question ; have you omitted or do you intend further on to give us the history of the Second Avenue Railroad case ?

Mr. SHAW—This is my brief, and you may read it yourself.

I am speaking from it (handing brief to Mr. Wickes). Mr. Wickes, requested to know what was the outcome of the suit that this company brought against the Second Avenue Railroad.

The CHAIRMAN—Is it reported?

Mr. SHAW—No, sir; the Second Avenue Railroad Company obtained the consent of property-owners on First avenue for an extension of their line on First avenue under this act of 1884, a route of ours, and they also obtained the consent of the local authorities, the Board of Aldermen, that they might build them. That happened to be one of the lines that the Cable Rapid Transit Commissioners had assigned to us first. We claimed we had exclusive authority to build on that line, and we having paid the expenses of that Commission held proprietary rights. That was our position, and to prevent that corporation from building on our lines we commenced an action, and applied for an injunction in the Supreme Court, which was granted to us by Mr. Justice Donohue. That case was argued before Mr. Justice Donohue by Mr. Evarts and Mr. Sewell on our behalf. Mr. Scribner—I do not know whether Mr. Trull considered himself in the case—took an active part in it, in conjunction with Mr. Hutchins, and generally the horse-railroad array of both Sharp and Conover. General Wingate, I know, did a good deal of talking with the Justice, who afterwards heard that case. The whole case was discussed. Mr. Evarts' argument lasted some three hours and a half; the discussion went through two days; and you will find the question of "time"—the question made by Judge Daly in the Court of Common Pleas was argued; and after considerable deliberation, Mr. Justice Donohue upheld the injunction; but he compelled us to go to the General Term, and to take a short notice, so that if the Second Avenue Railroad Company felt aggrieved they could have an early hearing at the General Term on appeal.

I may say that the condition of the Second Avenue Company at the time the injunction was granted was this: they had about twenty blocks torn up; they had three or four thousand Italians employed; they were under very large obligations; we assisted them to a speedy hearing; this was given and the case was argued at the General Term with all the expedition that I could

aid in giving. Mr. Evarts argued it for us and Mr. Hutchins, reinforced by Judge Joseph F. Daly's opinion, which he quoted and presented, argued against us ; I had taken like proceedings in the Common Pleas against my friend Mr. Trull's Conover railroad on the ground that we had the exclusive right to Forty-second street ; and Mr. Trull made quick work, so quick work that he was able to have the opinion of Judge Daly before the General Term of the Supreme Court, from which you derive your appointment when Mr. Hutchins and Mr. Scribner argued all these questions there. Our corporate capacity was challenged ; our plans were challenged ; our time for constructing roads was challenged—everything was challenged that has been exhibited here, except that single question presented by Mr. Wickes about our liability to forfeiture to the city in case we were not required by our Articles of Association to do every act and thing to the very letter. Ridicule is no name for the answer that was made to this objection.

There, again, the General Term heard all this story of objections. Fully a whole day it was argued pro and con and we were looking with great expectancy for an opinion to be handed down when the Court should meet. I could get no intimation of what the decision was to be, and one morning I was visited by Mr. Hutchins, the counsel for the Second Avenue Railroad Company, who said, "I would like to withdraw that appeal from Judge Donohue's decision before the opinion of the General Term is handed down." I said to him, "What will you give?" He said, "I will pay all the expenses and your costs, amounting to some thousands of dollars ;" and he paid it. I wrote a letter for him to the Chief Justice to ask to have the appeal dismissed. He further gave me a stipulation that the injunction of Judge Donohue might stand, with the modification that I put that he might use the street that he had torn up and that his work might remain until such time as the king came to claim his own. That is the history and that is the way that appeal was withdrawn. I moved then for the appointment of this Commission and to say that our application was fraud on the Court is the height of impudence.

The CHAIRMAN—Did Judge Donohue give you an order upholding the injunction as modified ?

Mr. SHAW—Yes, sir ; of course he did ; how could he do otherwise when the General Term omitted to say, on application of my adversary, it had no views opposed to his ? I suspect the truth to be that Mr. Hutchins then knew what the opinion of the General Term was ; indeed, I think he saw it ; he knew it was his destruction.

The CHAIRMAN—Is there any dispute between you gentlemen as to the facts ?

Mr. SHAW—Mr. Trull and the other gentlemen are thoroughly informed about it.

Mr. WICKES—I never heard there was any opinion written by the General Term.

The CHAIRMAN—We have no right to consider that in any way ; I want to know if there is any question of fact between you gentlemen.

Mr. WICKES—The Second Avenue Railroad Company, in spite of the injunction, are running their cars to-day over that route.

Mr. SHAW—Over the districts and the routes allowed them ; if they have gone one foot beyond what I allowed them I will bring them up for contempt of court.

Mr. TRULL—That includes the whole route.

Mr. SHAW—No ; it does not.

Mr. TRULL—Mr. Shaw has got his stipulation ; but Mr. Hutchins does not make so favorable a statement as Mr. Shaw does for himself.

Mr. SHAW—Mr Hutchins withdrew his appeal, and he paid me thousands of dollars to modify Judge Donohue's injunction, so that the work he had done might be saved ; for he suggested to me, "after all, you may not get it, and we want to save," said he, "what we have done ; we want it if you can't have it." Mr. Sharp and others were asking for the same route at that time.

Mr. WICKES—I should like to see very much the modification of the injunction to which Mr. Shaw consented.

The CHAIRMAN—It is safe to assume that he did not consent to very much.

Mr. SHAW—Now, I am going, in order to give complete illustration of this whole business, to read the complaint in that case. The complaint is as follows :

(Here Mr. Shaw read the complaint.)

I want to show that, in our complaint, we brought home all these questions, all these acts and doings that have been introduced to confuse counsel here ; and the Court was asked to make a full disposition of the matters stated in our complaint.

Now, after we had gotten all those rights which were consummated by our Articles of Association, on the 22d day of April, 1884, the the Act of 1884 was passed ; as of the date—and no other date—of May 6, 1884. We claim, that having paid for this exclusive right to our location, it was not competent for the local authorities, or anybody, to allow somebody to slip in and compete with us for any of those routes, and get consents from local authorities or property-owners to take them. We had the *first* right to ask for consents, and until that right was exhausted, and until we were refused them, that right must be held in abeyance ; and the result of that was that we had our injunction. It is subsisting now in a modified form by stipulations between us which are perfectly satisfactory to me, as spokesman for our corporation. The case I made was sustained by Judge Donohue ; it was argued elaborately, and then appealed to the General Term of the Supreme Court, and after it was submitted the counsel for the Second Avenue Railroad Company came to me and asked to withdraw his appeal, and I permitted him to do so on payment of money, and on stipulations which allowed him to save the work he had done, and a little more. I got that money and turned it over to our corporation. Our corporation knew where it came from, and, by my advice, took it and has used it for corporate purposes.

Mr. V. MARSH—The General Term since then has decided the Boulevard case.

Mr. SHAW—I am glad you called my attention to that. Under the rules of this Commission, we were to close our proofs within a limited time. We appeared before the General Term and made no objection to Mr. Deering's motion as to the Boulevard. Let the Boulevardists go on, but I must say this: Mr. Sewell made the intimation before the General Term on that motion, that it would be proper to suspend argument and decision in this matter until after the report of your Commission. Mr. Sewell understood the Court to assent to that proposition. There was no brief, nothing, and I was much surprised at the decision confronting us from that Court. Mr. Deering pursued the matter while Mr. Sewell was resting in confidence upon the disposition of the case in the way that he had suggested. We did not pay any more attention to it. While we are seeking to have the Boulevard route, we do not care much about it.

The CHAIRMAN—Who gave the prevailing opinion in the Boulevard case?

Mr. SHAW—Mr. Justice Daniels wrote the opinion and he put it upon two grounds: One ground was that our plans were indefinite. On this ground the other justices did not concur. So you see that the Court was not against us on the matter of plans.

Respecting plans, I have exhibited the Cable Railways of San Francisco and Chicago as a practical model. The Court did not have this fact before it. The Court had no fact before it. Mr. Sewell must have been tremendously deceived about the intimations of the Court. Had he not been so deceived, do you suppose we would not have had a brief there—a brief that would have met all this question? Why, let me give you the brief we made when subsequently the matter was brought before the General Term. I give it to you from the brief made to correct this thing. I have the brief in my hand. From it I read as follows:

“ADDITIONAL POINT by Messrs. Sewell & Shaw.

“The decision in the Boulevard motion in this matter is no precedent. That motion was not contested. It was simply submitted with an affidavit showing that the Court's Commissioners were about closing the hearing before them, and the suggestion was made by petitioners' counsel that it lay over and be considered when the Commissioners' report should be presented to the Court.

There was no argument, no brief, no opposition, no submission of any question on the part of the petitioner, except the suggestion and application supported by an affidavit drawn pointedly for the purpose, that the motion lay over to be considered later on, when the Commissioners' report should be laid before the Court. The proofs that would accompany that report were relied upon to meet the questions raised on that motion. If the petitioners' counsel (the undersigned) erred in supposing that this was the natural and proper disposition of the motion, the motion must be considered as taken by default and the opinions handed down, as given in the absence of a contention, although petitioner intended and expected to make a contention at a time that its counsel supposed was especially suitable and agreeable to the Court. It can hardly be questioned that the motion might, at the time and under the circumstances shown by affidavit, be fairly regarded as premature, and that was all petitioners' counsel sought to submit for the consideration of the Court. It is respectfully submitted that the present motions are in the same category. It is further submitted that the argument on these motions should be regarded as a rehearing, if not the original and only hearing of the Boulevard motion.

"The opinions of the Court on that motion should, under the circumstances, be *tabula rasa*. Until the present term of the Court expires, the Boulevard motion may be reheard on a proper application. Such application will be made and a resettlement of the order entered will be prayed.

" ROBERT SEWELL,
" CH. P. SHAW. "

Other questions are considered in our brief we made, responsive to this recent application of our opponents to the Court. Among those questions are questions concerning our plans. This is what we replied :

"So far as the alleged indefiniteness of the specification is concerned, the plans are quite as specific as those of the New York Elevated Railroad, which were approved by the Court. There must, as the General Term said in that case, be 'some flexibility' in these respects. It is not to be expected that working drawings should be made by the Commissioners.

"There can be no more definite description of a *surface* cable road than that given in our Articles of Association, namely, according to the most approved plan of cable traction as operated in San Francisco and Chicago. The cable roads of those cities are of world-wide reputation and may be considered as a conspicuous working model for this company. This method of description has been sanctioned by the Legislature in the charters of nearly all our Horse railroads, which are required to be built 'according to the most approved plan 'of Horse street railroads.' "

Ex pede Herculem. If such a question as this was discussed before the General Term, from whom you derive your authority, have you any suspicion that all the other questions that are

brought here were not discussed? I challenge this whole array of opposition to say if they have any *new* question—any question that they have not already carried to the Court. I know they have no question, and they know they have no question that has not already been considered.

The CHAIRMAN—You just now stated that Mr. Justice Daniels based his opinion in the Boulevard case on two grounds, one of which related to plans. What was the other ground?

Mr. SHAW—That we had not given sufficient evidence that we had statutory refusals of the property-owners, so that it was not competent for the Court to grant the appointment of commissioners.

On this ground we were not heard. If a great Court like the General Term of the Supreme Court can lay us by the heels without hearing us, why, what can we say? We can only say that if we misunderstood the Court about a hearing, which we supposed was to be postponed, we ought not to be pierced to destruction and death in an interlocutory way. That Court, or any other Court, ought not to call *stare decisis* on us, so long as the questions before it may be ultimately reviewed by it. The Court is too great a one to say that it will rush to decision without a hearing. No hearing was had. The Court knows now that we expected that all questions would be deferred until the report of your Commission came in. We did not expect snap judgment without debate on what we regarded as a frivolous, interlocutory motion should be had. It is idle to suppose that we, Mr. Sewell representing us, would allow decision on all our questions without discussion. Who can say—who ought to say—that such a little motion as Mr. Deering made about the Boulevard, decided without debate, when we all supposed that it would be deferred for argument until your report should be presented, should work the destruction of our whole system. The moment we heard of it, the thoughts of our counsel were turned to the great question, Is it possible that this beneficent scheme of intramural transit is to be ruined by a bit of practice? Is it to be taken by default? Is it to be lost because our counselor misunderstood the Court on a trivial matter? It seems to me improbable. Mr. Sewell under-

stood the Court to say, on an affidavit presented by him, that the Court would suspend judgment until your report came in. But judgment distanced his expectations while we were in the midst of our labors with you. Is such a pitfall to attend every public enterprise? If this be law, and I suppose it may be, think of it and mourn over it. I can afford to go down. Can the public's downfall be so easily atoned? It's a horrible thought.

Well, let us fall. If the judiciary want to destroy us, we must accept the situation. No thought must be entertained as to the purity of the motive. I think I see all the motives that made our Code of Procedure in the light it was made. If ancient nuisances which codifiers have tried to destroy still exist, and such public services as we propose must be destroyed by them, I must accept the situation, though I know, as absolutely as human perception can know, that the Code was not intended to permit it, and the law never contemplated it. My span of life is brief, but any attempt to reintroduce into our jurisprudence effete things that we had fondly hoped had gone and gone forever, amazes me. How grand was Mansfield, by whom slavery was abolished in England forever! He had no Code of Practice to restrain him from making that great judgment. He did it on law—pure law. Are there not a thousand precedents in our own great Supreme Court that tread upon feeble technicalities? What Judge has done more in this very matter of our city transit to stamp upon and disregard irregularities in proceedings relating to such public services as we propose than our most approved and judicious Judge Daniels. The precedents of his making are numerous and too conspicuous to invite question.

So, therefore, when Mr. Coudert, leading the array of opposition, tells you that the opinion of Judge Daniels on this Boulevard notion is a plain, clear, irreversible declaration of the General Term that the Court intends to destroy us on technicalities, omissions and irregularities, that this plain purpose appears in Judge Daniels' opinion on a motion we never argued, which we understood never was to be argued until your final report came in, and which was taken by default, I say, Mr. Coudert says a preposterous thing and casts a stigma upon the consistency and learning of the great Judge that he has harnessed like a donkey to the jaunting-car of his argument. Absurd!

Now, Mr. Conover, represented by my friend Mr. Trull, was in the same category as the Second Avenue Company ; he had slipped in where we had a statutory right to be. He slipped in and got consents from the local authorities and commenced to build his road, and we stopped him by injunction. The result of that application was, that Mr. Justice Daly delivered that opinion in which he substantially declared our charter invalid for the reason that a definite time had not been specified, as he stated. It was too fluctuating for the building of our road. But you see how much attention the General Term of the Supreme Court has paid to that. And how, under the general authorities, how foolish and childish that objection was. But we came to some agreement before getting this opinion, and Conover's corporation gave us bonds for twenty-five thousand dollars that it would pay us any damage we might suffer, provided the Court should ultimately give us the right to it. Of course we shall tear up their tracks and put them into bankruptcy.

I have here my argument in print on that discussion before the Common Pleas. I was under the impression that I ought to read it, but I wont ; I will submit it.

The CHAIRMAN—I suppose you ought not to submit it to us unless you do read it.

Mr. SHAW—I suppose the Commission won't care to have the whole argument read. Why, it took me a whole day to make it. But there are some pertinent parts of it which I should like to have read—the parts that show that all these more pronounced questions we have been discussing here were discussed before the Court. That will assist the movement of the argument I am now making, as well as supply evidence.

Chairman PELTON—We do not intend to compel you to read that whole argument. But, of course, we want to know the pertinent parts of it.

Mr. SHAW—Grant me a moment to mark such portions as I propose to have read.

(Here portions of the argument were read, as follows, by Mr. Shaw's associate).

“Now our case is this: Prior to 1875 the people of the State of New York claimed, held and reserved in full proprietorship, a title to all the streets of this city. They could dispose of such streets for purposes of public transit, absolutely and unqualifiedly to any party whether person or corporation, they might choose by act of the Legislature. I will not elaborate this proposition. I only wish to notify the respondents’ counsel that we rely upon this proposition as settled law, so that he may not be unadvised as to one of the main grounds of our contention, and answer it as best he may. I therefore say to him, prior to 1875, there existed in the Legislature an unqualified, exclusive and absolute power, without let or hindrance from the local authorities or abutting owners, to authorize railroads to be built in any street of this city. This is the doctrine of the case of *The People vs. Kerr*, 27 N. Y. R., 188. That doctrine stood unquestioned, clear and plain, within the knowledge of everybody who had or has any interest in the horse railroad corporations in this city until January 1, 1875, when the Constitutional Amendment relating to the subject went into effect. Without throwing any particular reflections upon anybody, it is proper to say, that a condition of things arose by which the people of the State thought that their Legislature was endowed with too wide a power over the subject of city transit. In fact, some scandal arose about the Legislature at Albany granting railroad franchises to individuals and corporations in the City of New York; and hence, as we all know, the Constitutional Amendment of 1875 was passed. By that Amendment it was provided that if any further transit franchises should be granted by the Legislature for the City of New York, or any other city or village of the State, such grants should be made under general laws, with the approval of the local authorities and of the abutting owners; but in case the abutting owners should not approve, the General Term of the Supreme Court might deal with and dispose of the question in its absolute discretion, after proper inquiry, so far as the abutting owners might be concerned. Your Honors will observe that there was no *proprietary* right of the people remitted or released by this Constitutional Amendment. Nothing was granted, given up, or in any way waived in the nature of a proprietary right, to the

abutting owners or to the local authorities. The whole motive of the amendment was, as we all know, to deprive the Legislature of the unqualified power of making grants of these franchises, except by requiring some condition of assent on the part of the abutting owners, or in lieu thereof the determination of the General Term of the Supreme Court, and also of the local authorities. *These assents were required only to prevent improvident grants by the Legislature. They were not required, because it was thought that the abutting owners or the local authorities had any proprietary right in the premises.* The Constitutional Amendment never disturbed, and never was intended to disturb, the proprietary right of the people of the State. The consent of the abutting owners, or in lieu thereof the determination of the Supreme Court and the consent of the local authorities were merely consents required in the course of administration, and may be called merely *administrative* consents—that is to say, it was thought that such parties might be a safe resort through which to ascertain, as the Legislature could not well do, whether or not a particular railroad should be built. But, as I have said before, no proprietary right was granted or intended to be granted to the abutting owners or to the Supreme Court, or to the local authorities; that right belonged, as it did before the Constitutional Amendment, *in the people of the State of New York.* It was a right which the people reserved, and which the Legislature could grant away, subject to the consent of the local authorities and abutting owners, just as unqualifiedly subject to such consents, as it could do before the Constitutional Amendment was adopted. But it rested with the Legislature to say in what manner, and on what considerations, terms and conditions, and by what processes such consents might be asked for, *and who might ask for them.* The power was left with the Legislature to say that *nobody* should ask for them except, *in a certain way, and by doing certain things, and after certain steps had been taken; and it had a right to say that after certain proceedings had been taken that a certain party should have the exclusive right to ask for, and obtain the consents of the local authorities and the abutting owners, or the determination of the General Term of the Supreme Court; AND IT HAD A RIGHT TO SAY THAT*

NO OTHER PARTIES SHOULD HAVE ANY RIGHT TO ASK FOR SUCH CONSENTS. It also had a right to say that *inducements* might be offered to parties on expedient terms and conditions, whereby such parties might alone be clothed with the right to ask for and obtain such consents, and thus complete a right to transit franchises in this or any other city of the State. All this power the Legislature exercised in the Rapid Transit Act (chap. 606, Laws 1875). Mr. Tilden was then Governor of this State. The Constitutional Amendment, and all the motives to be worked out by it, were then fresh and familiar.

“Under this act the New York Cable Railway Company derives its right—its sole and exclusive right—to ask for and obtain the consent of the local authorities and the abutting owners, or in lieu of such owners’ consent, the determination of the General Term of the Supreme Court.

“Now, on the threshold of this contention, I notify my friend—the enemy—that he never had the right to ask for or obtain the consent of the local authorities or abutting owners to the *locus in quo* for a railroad as against our corporation, for the reason that we took the offer of the State to give us, on terms and conditions for which we paid, the sole and exclusive right to apply for and obtain such consents. And that whatever he may claim or has acquired in that direction is as though he had bargained with the idle wind.

“Before proceeding further with this branch of my opening, I wish to throw out another suggestion for my friend to meet; it is this: we have the PROPRIETARY right of the people of the State in *reversion and remainder*, if we choose to accept it, after having obtained the consents of the abutting owners and local authorities. And it so happens that there is another party interested in our endeavors and concerned very materially in our success; that party is the City and County of New York. That interest arises under § 7 of this Rapid Transit Act of 1875. By that section it will be perceived if we do get the consents of the local authorities and property owners and *fail* to build *all* the roads our system calls for, the city may own the franchise for any *unbuilt portion* assigned to us as property in perpetuity—that is, the proprietary right of the State and all other rights

gained by these administrative consents, if not availed of, revert to the Supervisors of the County of New York. The Supervisors of the County of New York being the Board of Aldermen of the city. (Counsel here quoted in full § 7 of the Rapid Transit Act.) In this view of the case there might well be another party at my side here to-day—the Counsel to the Corporation of the City of New York might well be here. We have not invited him. He has no notice of the broad question so deeply concerning the city's rights. But, he might well be here, because the rights we own, if we do not fulfill under them, and perform every condition, as our charter requires, revert to the city as remainderman *as to the unfilled part*; in that relation the authorities are not few nor conflicting. If it be as we claim, that we alone or rather we *first*, have a right to seek and obtain consents to build a road, the City and County of New York as remainderman may well watch with deep interest our proceedings. The great equity rule that protects prospective or remotely contingent rights of a child in the womb, or any conditional interest of the remainderman to an estate, is a very important matter to the City of New York; for it involves an absolute proprietary right to our rights in case we fail to avail ourselves of them or any portion of them. In short, we have the State's proprietary right *now*, the Mayor's Commissioners gave us that, and when we get the consents of the local authorities and property-owners, we have every right, and if we do not avail ourselves of such right, the city owns as remainderman.

“This condition of things was thoroughly apprehended by the Rapid Transit Commissioners appointed by Mayor Edson last November, and in granting to the plaintiff corporation the rights now claimed by them, they well understood the nature of the powers they were exercising; they knew that they had a right to grant the proprietary right of the State, subject to the consent of the local authorities and abutting property-owners, to the routes fixed and determined by them. They knew, that subject to such consents, their power gave them authority to authorize a railway or railways, or a system of railways, to be operated by steam power or any other power, except animal (§ 26, sub. 4, chap. 606 Laws 1875), “over, under, through, or across” any street or avenue of the city except such as were prohibited by the Rapid Transit

Act. Their attention had been called to the great modern improvement in city transit known as the cable railway—its success in San Francisco and Chicago had demonstrated that animal power must go; that all convenient routes adapted to the cable plan ought to be availed of immediately. They entered upon their duties impressed with the fact that there was *then* no law on the statute book which would authorize a street railroad of any description in this city or any city or village of this State except under the Rapid Transit Act; that act was passed June 18, 1875, and it was the only act on the statute book whereby any street railroad could be authorized for any city or village of this State. Eight years had elapsed from the Constitutional Amendment of 1875, and from the passage of that act, and though the Legislature had been importuned, as we all know, at each annual session, for some act that would grant away by some other than the Rapid Transit Act, the proprietary right of the State, subject to the consents of the local authorities and abutting owners, still the Legislature refused such an act. All this matter of intramural transit, except under the Rapid Transit Act, was at a standstill. Our city was growing—our neighboring cities were growing. No man could say when the Legislature, so persistently importuned and so persistently refusing, would grant an act to give any authority for street railroad transit except by the Rapid Transit Act. In this condition of things it was found that that act, already upon the statute book, was adequate to all the needs of intramural transit in this city. Invention, since that act was passed, fulfilling its great office as the tenth muse—had demonstrated that cable roads could best afford intramural transit in this city. This act was therefore invoked to do the duty and meet the requirements of the public service in this matter of transit for this city. The man who knows anything valuable to know of the matter does not exist, who is bold enough to say that the cable system is not in every respect superior to the animal power system. It gives speed without danger. It gives a constant service irrespective of snow and ice. It gives unlimited supply of transit facilities on any given route. It fails neither in summer heat nor winter frost. Storms of snow, wind, or rain cannot retard or prevail against its uniform and steady

service. The sanitary considerations involved in its substitution for animal power, distinguish health from pestilence. These are but few of its immense advantages. To be brief, I am justified in saying that the invention of cable roads is an invention of enormous public beneficence. This is enough to say here and now of the merits of that system of city transit. Of course, it commended itself to those of our citizens who were interested in the subject. Meetings of property-owners were held. Lawyers were consulted. The subject was examined and it was found that the Rapid Transit Act of 1875 was adequate to give full authority to build cable roads, whether elevated, surface or underground, or partly of each of these kinds of roads in combination, on many convenient streets and avenues of the city, and to provide a comprehensive system of such roads in this city. Property-owners and capitalists were quick to take advantage of the cable invention, and of the statute which could provide franchises for its introduction. Out of their appreciation of the subject has grown The New York Cable Railway Company. As a result of this appreciation, city taxpayers presented a petition, duly sworn before a Justice of the Supreme Court of this judicial district, to Mayor Edson in November, 1883, asking for the appointment of Commissioners to do and perform the services required under the Rapid Transit Act. The petition was signed by 116 property-owners, representing as is said upwards of 300 millions of taxable property in the city. It was a strong appeal—an appeal by our most prominent and wealthy citizens, for a system of surface cable roads under the Rapid Transit Act. In that petition was set forth the merits of the cable railroad. The petitioners indicated in their petition that a system of cable roads was requisite—a system that involved transfer tickets, so that for a five-cent fare a passenger could ride all over it, whatever might be its extent, and wherever it might go, up-town, down-town, or across town. This was the controlling thought of the petition. Of course, if the fare was limited to five cents, the extension of the system to thirty, forty, fifty, sixty or eighty miles means a dilution of the monopoly in the ratio of its extension. That was the theory of the Commissioners, and this is the nature of the beneficent monopoly we are contending for. But whether

our mileage be great or little cuts no figure here, as a matter of law. Yet, when presented, as it has been presented, in the newspapers and elsewhere, and may be flourished by counsel before your Honors, I wish to submit against all that *ad captandum* this one suggestion: Should the extent of our mileage unfriendly govern the notion to be entertained of our monopoly, provided we are compelled to carry passengers over all our system for a five-cent fare? Would not our monopoly be really larger and more burdensome to the public, if for that fare we had only one mile, or five miles of road? Manifestly, extension is synonymous with dilution, as long as our fare is fixed at five cents. In other words, the larger our mileage the less is our monopoly. This must answer all that is flourished and flouted in our faces by zealous advocates as to our overshadowing monopoly of routes.

“But this matter of the extent and number of our routes is a matter with which the Court is not called upon to deal. I speak of it because so much has been said and printed about it to our disparagement. It is said we have twenty-nine routes; that the mileage of these routes covers anywhere from seventy to one hundred miles of street. If that be so it must not be forgotten that a five-cent fare can command a ride over all of it. Our critics are horse railroad people who do not give, and never have proposed to give, and will never give, any approach to such a mileage for such a fare. The system of transfer tickets, so that at convenient points passengers without additional fare may go up, down, and across the city, never can be a feature of the present horse railroad system of the city. Our system is set forth in this map I hold in my hand. It is drawn on a large scale; I will hand it up for the inspection of the court. (Mr. Shaw handed up the map.) On this map your Honors will find what our system embraces; you will from it see the grasp taken of the subject by the Rapid Transit Commissioners; you will see the mileage they give for a five-cent fare. The conception of the commissioners as shown by this map is a grand one—I will say a beneficent one. Now this is the system we are contending for. This appeal has been taken because it had to be taken, *nolens volens*, to save that system. This contention is solely to save that system. Our client is but a corporation. It is not supposed

to have reasoning capacity, conscience or soul. The good and honest people who embarked in it found its corporate powers launched. They are not responsible for the magnitude of the system. Its magnitude is a burden upon the franchise. Less extent of road for the same fare would have been a more profitable franchise. The Rapid Transit Commissioners created it, and launched the corporation to bring it into operation. They created that corporation in the exercise of lawful powers and invited the public to take stock in it, to take advantage of its franchises, to assume its burdens, and to realize from it all the legitimate profits it could afford. We think, and I trust the court may be convinced, that the commissioners builded wisely, grandly, and beneficently in the interest of a public use, but whatever may be the view of the court as to the merits of the scheme of the commissioners no man or set of men, no corporation or combination of corporate interests, can be allowed to infringe with impunity upon the franchises *bought and paid for* by our corporators. Yes, the solid cash was paid.

“I now come to another proposition which I wish my learned adversary to note, for on it rests the superstructure of our right. If this proposition fails, all we contend for falls; but if it be sound, then nothing can prevail against us. That proposition is this: The corporation the Mayor’s Commissioners gave us was a franchise, granted as by an immediate and direct act of the Legislature itself. It was a franchise as direct from the Legislature as though in the exercise of all the sovereign power of the people of this State, the Legislature had competently and within strict constitutional limits presently and perfectly conferred it, and it had been enrolled as statute law in the statute book, passed as of the day when the Commissioners took our money and pledged to us without reservation, qualification or quibble, all we bought and paid for. We stand on that proposition. It is not original; nor is it new. The Court of Appeals propounded and declared it several years ago. The Commissioners comprehended this situation. The subscriptions to the capital stock of the corporation they created were based upon it. The occasion for the determination of the Court of Appeals arose on the construction of the powers of Rapid Transit Commissioners when the

validity of the charter similar Commissioners gave our elevated railroads, was questioned, as they are being questioned here: The Court said: "Corporations organized under the act derive "their franchise from the Legislature, and in no proper sense "from the Commissioners. The Commissioners perform no "legislative acts; they enact no laws; they simply perform "administrative acts in carrying the law into effect and apply- "ing it." (3 Abb. new cases, page 414.) This settles the nature of our charter. Whoever attacks it must attack the sovereign power of the State of New York. They must attack more. They must attack the sovereign power of the whole people of the United States—for it is of the nature of our constitution of government that National authority shall hold every State Government to such an observance of its contracts that they cannot be impaired.

"Now let us see what was this power of these Commissioners. Here is the Rapid Transit Act and all amendments (counsel handed to the Court copies of the document). This is how the original act opens as to the powers of the Commissioners. You will find it in the first section (Chapter 606, Laws 1875): "FIVE COMMISSIONERS WHO SHALL HAVE FULL POWER AND AUTHORITY TO DO AND PROVIDE ALL THAT THEY ARE HEREINAFTER DIRECTED TO DO AND PROVIDE." This is the exordium of the act. It is the swelling prologue to the imperial theme. What immediately follows in the act I pass by, to call attention to section five. Your Honors will there find a direct bid, placed by the people of the State in the hands of the Commissioners, *to give inducements* for investors to come into our scheme of transit (counsel read the section). What can such a statute be called but a statute of POWERS AND DUTIES on the part of the Commissioners and a statute of INDUCEMENTS to those who might rely on what the Commissioners, in the name of, and as the sovereign power of the people of the State, might offer? The Commissioners made an offer. It is formulated in our articles of association, which are the charter of the plaintiff corporation. Now let us stop here. Above and beyond all debate we accepted the INDUCEMENTS and paid for and took the charter tendered us by the Commissioners. That is clear. This appeal is brought to decide what we got by

that charter. It is brought to decide the principle of the thing. In this light I am offering all I have said and all I shall have to say. It seems by the opinion of the Hon. Judge in the Court below, who dissolved the injunction order from which this appeal is taken, that we have not a right to our injunction, because, among other things, the Commissioners failed to give us a valid charter. This appeal would probably never have been taken but for that judicial expression. It is taken chiefly to correct such a view. I must deal with it. Here is, as against the respondent, our chief contention ; but being brought into it, we must and do claim an EXCLUSIVE right to the *locus in quo*, as our sole and exclusive right for street surface transit. Our stipulations in the papers waive nothing as to ultimate right on the route in question. We took Mr. Trull's client's bond and let it go on ; but we intend to enforce its exclusion from the route in question unless convenient arrangements *for common use of the street* can be made with it for the accommodation of our system of intramural transit. This is notice enough on that subject to my learned friend.

“What I have said, I think, fairly generalizes for the purposes of an opening our main propositions, so that our adversary in his reply may not claim that he was unadvised of the scope of our views.

“I wish now to be more particular :

“*First*—I again call the Court's attention to the controlling fact that at the time the New York Cable Railway Company obtained its charter there was no other law on the statute book by which street surface transit could be acquired. The Commissioners entered upon their duties November 30, 1883. They steadily pursued their work and completed their labors, and completed our charter April 22, 1884. This was not a day sooner nor a day later than they were called upon to perform their duties by the act. Within *ten* days after their appointment, the Commissioners were to take oath of office, and give bonds to the people of the State for faithful performance of duties ; within *fifteen* days after appointment, they were to organize as a Board, with appropriate officers ; within *thirty* days after organization

they were to determine if there was necessity for further railways; within *sixty* days thereafter they were to fix and determine the route or routes of such railways as should be built; within *ninety* days after organization they were to propose "*inducements*," such as to them might "*seem most expedient*" by such public notices as they might "*deem most proper and effective*" to induce the public to come into an adventure to BUY a charter for the construction of cable railways on the routes "*located, fixed, and determined*" by them, which adventure was to be formulated into a scheme involving the incorporation of a company with a definite capital stock based upon the right to construct cable roads on certain terms and conditions on these located, fixed, and determined routes, AS AND FOR FRANCHISES.

"Within *one hundred and twenty days* after organization the Commissioners were to open books of subscription to the capital stock pursuant to due public notice, and within *ten* days thereafter they were to call the subscribers together for organization as corporators to choose directors and officers; within *ten* days after election of directors and officers they were to grant such a certificate to the directors and officers as would enable them to assert corporate powers and rights, and thus command a right to the franchises intended to be conferred by the Commissioners, provided the directors should file such certificate, with an affidavit prescribed by the statute, in the office of the Secretary of State and the office of the County Clerk of this county. There is no question but that such certificate and affidavit were duly filed. A certified copy of the certificate and affidavit from the Secretary of State must, under section 9 of the act, be held "*presumptive evidence of the incorporation of such company and of the facts therein stated.*" Such certified copy is in our papers. No one disputes this. Well, then: We are a corporation, and our charter exists in our articles of association, which, as the act provides, the Commissioners were required to hand over to us *after* paying them the money we *have* paid them. I think that is enough to say about our being a valid corporation. We present the certified copies from the Secretary of State. There is a case of "*presumptive evidence*" presented here. What the Court may make out of "*presumptive evidence*" in such a case

as this, I cannot say ; but it seems to me that, as there is no other evidence in the case we should stop here. If no other witness comes in, “presumptive evidence” must settle our status. There is and can be no other witness on this appeal. But we do not rest our right on this as a mere technical ground. Technical grounds are both grand and mean things. It is the office of a Court possessing both law and equity powers to do the grand thing, and eschew the mean—to always do the just and equitable thing. The broad and liberal equity powers of the Court, reinforced by its common law powers, can fulfill all the wisdom and purpose of a public statute, framed in the general public interest, as the Rapid Transit Act is, for the public service, in spite of technical objections, if any exist. Hence, if it be permitted, as the respondent claims, to go behind that certificate and affidavit and look into the articles of association which the Commissioners gave us as our charter, the Court will say that any defect found therein relating to mere matter of form, and time, if not declared to be of the essence and life of the statute, and which are not essential to the practical realization intended by it, will be disregarded. But I shall speak of this later on.

“I wish now to call the Court’s attention to a certain feature of the Commissioners’ proceedings. It will be observed, if the times—days—within which the Commissioners were to perform their work are counted up, that they neither hastened nor neglected their duties, but on the very *last* day allowed them by the statute, they completed their labors. It cannot, therefore, be said that they ran a race of diligence for an *inning* on these franchises before they could be arrested by an act of the Legislature. For it is too notorious to be ignored, that when, by the public proceedings of the Commissioners, and the clear power they had over the subject of street surface railroad transit, the horse railroad companies of the city and every franchise-hunter that hungered for such franchises, saw the cable system in the field and, exclusively commanding it under the Rapid Transit Act they betook themselves to the Albany lobby and besieged the Legislature to repeal that act and bring to naught the great work of the Commissioners. What scandals grew out of their frantic attempts in this direction need not be referred to. The guise

under which they pushed their schemes against this cable system resulted in what is known as the General Street Surface Railroad Act, under which respondent claims, which is chapter 252, Laws of 1884. The crowning fact about that act, so far as our case is concerned, is, *that it was not passed until May 6, 1884.*

“Whatever right we had was acquired and paid for on April 22, 1884. Now let it stand as a memorial stone in this case that the respondent here claims one of the routes acquired and paid for by us, April 22, 1884, under this horse railroad lobby act of May 6, 1884. There we stand face to face with dates! It does not lie even within the power of Omnipotence to make April 22d come after May 6th. This fixes our vested rights. Our brief abounds in authorities and gives sufficient details to cover all excuse for not pursuing further argument on this question. But my learned friend will contend that this horse railroad lobby act did not fail of its mark. He will admit that it came a little too late for all uses, but that when it did come, it was strong enough and brought with it an energy that can double discount time and principle. He will speak of section 16, providing that “No street surface railroad “shall be constructed to run in whole or in part upon the surface “of any street or highway, under the authority of any commission appointed under the provisions of chapter 606 of the “Laws of 1875.” Of course that provision cannot be held to relate to any commission which had *already* acted—had done its appointed work and vested rights in pursuance of its authority. This section could not have meant us; we were clear and out of the way of all its intendments when it passed. But supposing we were meant, *we were not hit.* I propose to be bold about this matter. I say the Legislature could not strike us down by a retroactive measure. Nothing short of an amendment to the Constitution of the State of New York, and the Constitution of the United States could bring us to suffer a pang from this provision, or make it other than a joy to us, for as it must relate to *hereafter* commissions, it makes a monopoly of whatever the commission that had gone before, has given us. We accept the Rapid Transit Act of 1875, as modified and curtailed by our friends’ horse railroad act of 1884. We rejoice that it has been so modified. We are glad that no more commissions may be created.

under it to grant surface roads to compete with us. Our brief clears this point so conclusively that we have only gratification to express for this sixteenth section in the act of 1884. The water that once grinds shall never pass the wheel again, expresses not only the poetry, but the solemn prose of our relation to both the Act of 1875 and 1884. Lock your stables, gentlemen, but I admonish you the horse is gone with his legitimate rider—not stolen. So much for the Albany horse railroad lobby. But I cannot part with it yet. I must detain it just a moment longer. There is a section 18, in this great act of 1884, I find in this section this provision: “*Nothing in this act shall*”

“ * * * *interfere with or repeal or invalidate any rights*”

“*heretofore acquired under the laws of this State, by any HORSE*”

“*railroad company, or affect or repeal any right of any existing*”

“*street surface railroad company to construct, extend, operate or*”

“*maintain its road in accordance with the terms and provisions*”

“*of its charter.*” This provision brings me into a great appreciation of the Legislature. It is a Daniel come to judgment. Here we have it set down as statute law, that there are HORSE railroad companies for street *surface* service, and other *street surface* railroad companies which are NOT horse railroad companies. All are to be saved and excepted from the operation of the statute of 1884, just as if it had never passed. Where, then, are we? Look at us. We are the only thing that is not a street surface HORSE railroad company, and yet *we are a street surface railroad company*. Don’t we come within this saving clause? Don’t it look just as if the Legislature intended that the great rights we are here contending for should be saved? On the face of the statute, this purpose cannot be doubted. There we must rest our argument. Who or what moved the Legislature to make such a provision, we would not question. All I can say, there it is, and we come within the category of *surface* railroad companies which are *not* horse railroad companies. Judicial knowledge may or may not know absolute verity. But I venture the suggestion, from a careful reading of the section, that the provision was intended to save all vested rights, and to save them in such manner and form as would protect the franchises of the New York Cable Railway Company.

"If this rendering be approved, we are not harmed, but protected, by the Act of 1884. Nothing more need be urged on this subject; but I beg permission to hand up to the Court opinions on the point which have been given my client by those eminent and accomplished lawyers of our bar, Mr. Evarts and Mr. Loomis. (Mr. Shaw handed up the opinions.) On these opinions, and the elucidation of the question presented in our brief, I rely with confidence.

"How, then, do we stand? Manifestly, the *proprietary* right of the State to the routes assigned by the Commissioners to the Cable Company had passed out of the State to that company, or was held in abeyance for it at the time the Act of 1884 was passed.

"Those routes, therefore, could not have been included in and did not come under the operation of the Act of 1884. Hence, any consents given by the local authorities or property-owners—consents which I have called administrative, as they imply no proprietary right—are as null and void as if those routes, like the city parks, had been by express provision excluded from the operation of the act, or as if the act had never passed. If this be so, we have a right to the injunction we ask, because the pretenses of the respondent company are a slander of our title, and a pretense of title in itself to the proprietary right of the State as against us. They obstruct us in getting the administrative consents. They are a declaration of a right to build on our routes another railroad, and as abutting owners do not want two railroads in front of their premises, we are hindered and delayed.

"The hardship of such a situation, which scheming trespassers of the horse railroad variety are inflicting on us, can be readily apprehended by the Court.

"This matter of our *exclusive* right, we do not deny, largely depends upon physical and, I may say, social conditions, as well as upon our contract with the State for our routes. We have the *first* right to ask the administrative consents to build a road of our variety on the street. There must be silence for a space of time until we succeed or fail to get such consents. All other voices or supplications must be hushed until our appeal is answered or denied, if we pray for and pursue with diligence

such consents. If the consents be given us, then it would be fairly open to anybody else to ask for similar consents, *subject to our first choice of location*, for another road on the same street. For example, if our streets were adequate for several separate lines of road, and the local authorities or abutting owners, whose consents we must obtain, entertained no prejudice against a multiplicity of railroad tracks in the streets, then perhaps we could not under our charter claim an exclusive right. Then, the Court might say, perhaps, that there is room enough for all—room for us under the Act of 1875, and room for the respondent under the Act of 1884—build both roads and run them in generous rivalry and fair competition. I know well enough that the Court will not exert its power to give us an exclusive right expressly to save us from competition. We have not, nor do we make, any such claim under our contract with the State. The State has never yet granted any such right, and if it had, or should, the Courts would laugh it to scorn. Our demand for an injunction is not put on any such ground as that. Our ground is this: The streets upon which our routes are located are manifestly too narrow for more than our tracks—other tracks would encumber the streets and inconvenience the use of them. Perhaps our case made here might well have set forth the fact that the local authorities and abutting owners object to more than one railroad on the streets in question, and that they will not give consents for both our road and respondents’.

“But this is so obvious that judicial knowledge will readily apprehend it. At all events, we rely on judicial discernment in this aspect of our case. We have averred in our complaint this aspect of the injury to us from the respondent seeking and obtaining these consents when we had the *first* right to seek and obtain them. We paid for this first right. We bought and paid for the proprietary right of the State, on the condition that we had a clear and exclusive field to seek for and obtain these consents, if we proceeded with diligence. That was our contract.

“The Act of 1884 was not then passed. Now it is claimed that the Act of 1884 put the respondent in such a position as to give it a free and absolute donation of the proprietary right of the State, for which we paid large money, and enabled it to slip in

ahead of us and get those consents, and to then turn around and say, "Why, there is room but for one road here," and thus intrigue against us and prevent us from obtaining the necessary consents to complete our franchises. In other words, cut and carve as we will, the respondent gets what we bought and paid for.

"Now, against this we take our stand. We say that the State was in honor bound, after we had paid money for our charter, and acquired by purchase its proprietary right to the routes in question, with a right to build our railway on it, provided we, acting with diligence, should obtain these administrative consents, not to put any other party in a way, *by a gift* or otherwise, to obstruct us in obtaining such consents, and thus to obtain the same thing. This is what we protest against. The transaction of the corporators of our company in purchasing their charter was a transaction between business men and the State in its sovereign capacity. We are here to ask the Court to uphold it. All the circumstances surrounding the transaction should be regarded. The fact that at the time the State could not have dealt with us or the subject, except under the Rapid Transit Act, is a controlling one. The barrier to any other authority dealing with the matter was a constitutional one. We therefore claim that whatever we took by our contract we took as though no other statute *would* be passed to our prejudice, so far as concerned getting the administrative consents. There was no understanding imported into our contract that the State might by some subsequent legislation give the same right to another which it had given us, or make our enterprise the subject of common spoil to a herd of franchise hunters, *or rather franchise jumpers*, who might covet what we had acquired. We were not to take chances of that Rob Roy legislation, which allowed us to keep if we had the power, and which suffered anybody to strip us who could. One thing is certain: we were placed fairly in a position to *exclusively* ask for and obtain the administrative consents. That right was ours as long as, in the judgment of the Courts, we should diligently and wisely pursue it. When we got it our franchise was complete. The State should not, and has not, mocked us by putting anybody else in a position to obstruct our

getting those consents. The facility of procuring those consents is just as important as any other of our rights, and hence the unobstructed right to procure them is just as inviolate as any other feature of our charter. The State sold us the proprietary right under a contract expressed in our charter, that if within a reasonable time—"due diligence" is the phrase used—we should secure the administrative consents, our right to build the road would be complete. This facility of obtaining these consents is just as much a part of our franchises as any other. It is just as much of a vested right as any other; and all we say in our brief on vested rights is applicable to it. This facility is protected under section 18 of the Act of 1884, fully. Of course if the State, by contract, has given us the right to build our road on Forty-second street it cannot afterwards give the same right to another any more than a man can sell a piece of land to one person, and pending a subsisting executory contract sell it to another. Nor can it, with honor or the approval of the judiciary of the State, contrive ways and obstructions to make the performance of that contract *inconvenient* to us for the benefit of another. The State, our sovereign, the fountain of honor and law, acting by its legislature, should not be suspected of such a thing, or any unworthy thing. The Legislature should not be suspected of trifling, or charged with trickeries or juggleries of this sort to defraud citizens, or of doing any act which would disgrace and dishonor an honorable citizen to do (Mr. Shaw here quoted from Potter's *Dwarris on Statutes*, 61, note 7; *People v. Draper*, 15 N. Y. R., 545.) What sort of a thing is this? The sovereign puts out a decoy in the form of a right, to bait or entrap a citizen into the payment of money for advancing a public enterprise. It says: "Take all my right, which is the main thing, but you must also get certain consents which can be had only by you, if you go about it with diligence, and then you can command the enterprise and its profits and emoluments."

"The citizen seizes upon the offer, puts up his money, but when he reaches out for the consents, he finds his sovereign in front of him, parrying all his efforts and making it impossible for him to get them, by placing the same *proprietary right and the same consents* within the reach of another. Can I take money from

your Honors on an executory contract lawfully entered into, in which I have made conditions, and then do acts to make the performance of those conditions impossible to you, and then claim a forfeiture against you and keep the money you gave me? This is not the law. I will not mock justice by gravely contending against such a proposition, even as between citizens. But when such a proposition is stated as between the sovereign and a citizen, it takes on monstrous proportions. The great and fundamental maxim of the Institutes, "*Non potest rex gratiam facere cum injuria et damno aliorum*," thunders against such perfidy—such Punic faith. BROOM, commenting on this maxim, puts it in this form: "It is an ancient and common rule of law, that the King's grants are INVALID when they destroy or derogate from rights, privileges, or immunities previously vested in ANOTHER SUBJECT." (Broom's Maxims, p. 63, and notes, eighth edition.) This is the law—Roman law—English common law. Equity, honor, sovereign dignity, demand that it should be immutable and catholic law. We place our right to an injunction here. If it cannot be sustained here, we are free to say that it exists nowhere. What are the sovereign people's judges to do with such committals as the sovereign people have made to us? Are we to appeal to the Federal power of the nation to drive this abjured, juggling, joking, humbugging thing we call the Empire State into a sense of decent respect for its contracts? We entered into the contract by *inducements* from this sovereign Empire State.

"Where is its sovereign honor here? Its invitation through the Commissioners implied and *expressed* an obligation to protect our corporators. Our corporators responded. Were they invited to this feast to be betrayed? Was it a Borgia banquet to which the guests should have brought their coffins? Is this sovereign authority a joker, a juggler, a three-card monte player, that says, "Now you see it, and now you don't?" Or are we to take, act upon, and believe in the solemn word of this sovereign's statute and its officers, and rely upon them, as a great verity? Yea, as the verity of verities, direct from the fountain of honor—the verity of sovereign dignity—the verity that flames before this Court high and bright above all other legal verities, because the

sovereign's faith illuminates it with the Lamp of Honor! Civilized society could not be kept together in any respectable or stable form without such verity.

"I remember, when a boy, a question arose similar to this I am arguing, about the Broad Seal of New Jersey. I didn't then know anything about that seal or the question. But there was a great public excitement about the matter, and I got so impressed about that seal that I could not sleep o' nights. In those days I was full of the shield of Achilles, and that sort of thing. The splendor of the shield of that fitful and sulky contingent of Agamemnon was an immense matter with me. I was for Achilles. I believed in his shield and him. I likened it unto the Broad Seal of New Jersey. I cannot exaggerate the appreciation I then entertained of that Broad Seal. Forty million electric lights on a surface a thousand times vaster than this court-house could not have illustrated its splendor to my fancy. Well, I have arrived to manhood's estate. My boyish fancy was ridiculous. Ridiculous only in the *form* of it. But vaster far as to *substance* is now my conception from manhood's standpoint of the Broad Seal of New Jersey. That, as are all other sovereign seals, is an insignificant physical fact. Such seals are but mere perfunctory official things. They are not as large as the setting sun, and scarcely larger than a twinkling star, but they carry the faith, the honor, the inviolate promise of civilized society with them, which are as wide as the universe. The Broad Seal of New Jersey brought the Federal power of our republic to a realization of this immense fact. This fact was warmly, eagerly, welcomed by the Supreme Court of the United States. That Court ruled for it with decorous ardor in the Dartmouth College case, and it has always upheld it whenever cases have arisen that have given occasion to do so.

"This is enough on the subject of our *exclusive* right. I now ask your Honors to consider an aspect of this case with respect to which much I have said is applicable. The Judge in the Court below, whose opinion is in the papers—I have alluded to it before—expresses a view that our charter is defective in a single particular. I do not think it lay with him, or lies with you, to call our charter in question on this appeal, but I must deal with *his*

question. I shall have to deal with it as an advocate; and in doing so, I feel that some certain restraint ought to govern me. It is best to begin right. I therefore say I have the most undoubted confidence that the Judge below expressed *his* views in this case. From *his* views we are forced to dissent. There is much clamor about these railroad grants. Much or little may be known about them by the Judges of this Court. I assume and believe that no Judge of this Court knows anything about them except what is exhibited in proof before him. As to the Judge below, and his decision, from which this appeal is taken, I wish to say I never honor him too little, because I cannot honor him too much as a conscientious magistrate; but I am forced to speak right out against *his* conception of the law of this case. *His* view of our charter does not broadly embrace the conception that it comes from the State, that it is in no sense a private grant, that it involves matters of public service, that State officers gave it to us, that we paid for it on invitation and by *inducements* which those officers put forth by direction and authority. *He* failed to consider that we stand in a relation close to the sovereign dignity of the State and to all the people of the State. Suppose that an "i" was not dotted or a "t" crossed, as he thinks it might well be. Admit that *his* view of the precise form of such a charter as we have, is not quite according to the form of a charter *he* would have drawn, had *he* been a commissioner. Admit these, or all other technical objections the crankiest objector could make. What is the force of them? They are nothing. It is too late to stand on ceremony or technicalities about the Rapid Transit Act of 1875. It has been declared by the whole judicial authority of this State to be a *public act and valid*. Now this appeal is taken because the judge below has decided that some matter of *time* has not been fixed in the charter of our company for the construction of our roads with absolute definiteness—in accordance with his conception of the literal directions of the statute—hence it is insinuated that our charter is void, and that we have no rights to enforce under it. This we submit is not the rule of judicial interpretation. Look at 7 *Hun*, p. 241, where the General Term of the Supreme Court declared in the elevated railroad cases

under that act where such questions were raised : “ *In any event, the time within which a public act is to be performed is not mandatory but directory, and a literal observance of the direction as to time is not indispensable to the validity of the act.*” Go further, consult any elementary authority which deals with such a question. The best authority I know of is “Sedgwick on Statutory and Constitutional Law.” At page 368, and in the next twenty-five consecutive pages, will be found the law on this subject. I will read but a paragraph from page 368 (Mr. Shaw here read) : “When public statutes direct certain proceedings to be done *in a certain way, or at a certain time, and a strict compliance with these provisions of time and form* does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed.” This authority from which I read, deals with the question as to how the “judicial mind” should view such a charter as we hold from officers delegated by the State to grant it.

“Now, the original Rapid Transit Act contains forty-two sections, and there are many more sections by way of amendment, and prescribes more than 100 provisions as to the certain way and certain time by and within which things should be done. We claim that all these hundred and more things have been literally done and provided for precisely in the certain way and certain time required by the act. But suppose they had not? Time and method of procedure are not of the essence of a public statute, unless so declared in the statute. On the contrary, the largest indulgence is given to miscarriages as to form and time, which do not affect the main purpose of the statute. The purpose of the statute was to give speedy and needed city transit. That transit could not be had without the administrative consents. No man could say when those consents could be obtained. The Commissioners saw that and were not disposed to *guess* about it. They said, “We know from engineering experts who have “advised us about how long it will take to build the rail-
“way *after* permission to build it is given, but we don’t know
“how long the Board of Aldermen, the abutting owners, or the
“General Term of the Supreme Court may deliberate about
“giving the permission. We, therefore, fix the time for the con-

“struction *after* permission is given. We also require, so that no “delays may be possible, that the administrative consents shall be “sought for with all due diligence.” That requirement left the question of diligence in pursuing the consents with the courts. Could it be left in a better place? Does anybody complain that we have not been diligent? Do we not aver diligence? Does any one deny it? Is not our diligence the chief grievance of our adversary? Would he not rejoice if we had not been so diligent? Is it not his trouble that we are too diligent? I think the Court understands this. Now, who makes this complaint? It is a *horse railroad* party who claims under the General Surface Railroad Act of 1884. Section 10 of that act provides for the completion of roads to be constructed under *that* act “*within three “years after obtaining such consents,*” and if legal proceedings delay, the time may be further extended for construction. Is not this a fair and full legislative exposition of our Commissioners’ views on this matter of time? What more can be needed? I would ask your honors to consult Sedgwick on Statutory and Constitutional Law, p. 252, under the heading “Legislative Exposition,” where all I could or would say on this subject is luminously expressed. I will read but a paragraph from the Vermont case referred to (Mr. Shaw read): This is the law everywhere. There is no doubt about it. The act of 1875 and the act of 1884 are identical in their aim. They are both public acts. They both mean city transit. They are in *pari materia*. The latter act refers to the former—see § 16—and both deal with the public question of intramural transit. Both acts contemplate, as does the constitutional amendment of 1875, that no construction of railroads can be undertaken until after the administrative consents are obtained. The time to obtain those consents is recognized in the act of 1884 (as it ought to be) as an *unknown* quantity. Our Commissioners, under the act of 1875, dealt with it in the same way, but they added, to carefully guard against any possibility of abuse of our corporate powers, that we must pursue those consents “with all due diligence,” and thus placed us within the reach of the Courts. There we are. Who shall say that the check-rein of judicial power can’t or won’t control us and end us on the complaint of some competent objector? Is this Court to say, as the Judge

below says, that this Court of Common Pleas can't trust the Board of Aldermen? That it can't trust the General Term of the Supreme Court? I leave the consent of the abutting owners out of the question. They are not factors here. If they were here in a body and assenting to our scheme of transit, and the Aldermen were also here and assenting, the Court below would still say, "It is all wrong to let this Cable Company live, because its charter as drawn was 'too fluctuating' in the matter of time allowed for constructing their roads. No matter if the indefinite time of the charter had been followed by prompt or instantaneous consents, still that would not cure the defect in the charter." If the abutting owners were here to say that they never would consent and the Aldermen were here consenting, then we would only have the General Term of the Supreme Court to consult, but the Judge below would rule "this is too fluctuating—we can't trust the General Term of the Supreme Court doing business in time." In short the opinion of the Judge below means that this Cable Company shall not survive; because its charter does not conform to the provisions of section 6 of the Act of 1875 as *he* reads it. He attaches no importance to the requirement of the "due diligence" clause. He expresses no appreciation of the power of any competent objector, or of the Attorney-General, before the courts, to end all "fluctuations" of time in case we fail in diligence. The logic of his position is this: The time was not fixed properly by the Commissioners, consequently the charter they gave our Cable Company is absolutely invalid and void *ab initio*. It means that, if on the very day our charter was granted, the Aldermen and abutting owners had given us their administrative consents, such consents would have been vain and ineffectual, because the TIME for the construction of the Cable Company's roads was not *fixed* to run from a date which should *include* the time of obtaining the administrative consents on the same day. That is what the Judge below meant. Is it a wonder that we are here on appeal? Would it be a wonder, if we would never rest so long as there is a Court in the land to hear our outcry?"

Now, in conclusion of this topic, I seriously ask if it will be contended that any whipster who is sent here by horse railroads to

goad and annoy me can get up gadfly-excitement which shall so result that a grand structure like ours is to be crumbled ; I think not. Gibraltar can't be taken by Tom Thumb with a pocket pistol, and our outworks even don't contemplate any greater fire. His catapult is feebler than impotence. I have no name for its infinite weakness. We are not a card-house, to be destroyed by straws or sham spears of any sort."

Mr. SHAW (speaking to his associate)—This is enough of that argument. Mr. Shaw (addressing the Commissioners)—What has been read conveys all that I wanted to convey to assist the presentation I have in hand. I think the Commissioners understand this.

Chairman PELTON—We understand you perfectly, Mr. Shaw you may resume your argument.

Mr. SHAW—Now our case is this: Prior to 1875 the people of the State claimed and held in full proprietorship the title to all the streets in this city. They could dispose of such streets for the purpose of transit absolutely and unqualifiedly to any parties, whether persons or corporations. They might do this by the act of Legislature. Now all this array of opposition from these horse-railroad camps that I am contending against, these railroad men who are bombarding us, derive their rights from the act of May 6, 1884. They attempted to file upon our routes, while we were diligently trying to get the consents which we have bargained for with the Legislature of this State—for it is the decision of the Court of Appeals, that the Rapid Transit Commissioners dealt with us in the capacity as a Legislature and they gave us the consent of the people. We are bound by those Articles of Association to proceed with due diligence to get the consent of the local authorities and property-owners and as long as we are actively engaged in that, no person has the right to file upon our route under the Act of 1884.

Now, I beg to say, that all this argument I made before Mr. Justice Daly's Court of Common Pleas, was made before the General Term of the Supreme Court that appointed you. His decision on that argument had been twice before that same General Term weeks before you were appointed. The strain of my

argument was caught by the master-hand of Mr. Evarts, and all questions were presented and driven home.

To be exactly just, I ought to say the strain is all his own. Its vital power was derived from his own interpretation, and without which all we are, and all we hope to be, would have been buried beneath the avalanche of opposition that I so easily contend against here. When his commanding juridical conceptions of the intrinsic rights of our corporation were unfolded to our corporators in the situation they were exposed after furnishing hundreds of thousands of dollars in our enterprise, they no longer inquired about the authorship of "Beautiful Snow," but we felt in our veins such milk as Romulus fed on, and which made memorial the retreat of Justinus, near which, against the foremost power and the foremost lawyers of the world, and before the foremost jurists of the world, our Geneva award was argued for and won.

I tender to all these horse railroads a Scotch thistle. Touch me if you dare.

The appointment of Commissioners by the General Term is the result of Mr. Evarts' argument. Hence you are sitting here as Commissioners. Mr. Evarts' opinions I have laid before you. They cover every question except the question of notice to property-owners, about which no hearing was had, and which he and all of us supposed, from intimations of the Court, was to be held in abeyance until this Commission's report should be submitted to it. If we erred in this, it was a misunderstanding which we have corrected on *nunc pro tunc papers*. To show that this is so, I have read a point on our brief to the Court to correct the error, and all the error has been corrected. It is the additional point by Messrs. Sewell & Shaw, which I have read.

Chairman PELTON—We recall it.

I wish the Commissioners to understand that on the 22d day April, we had a grant from the People of the State of New York in its sovereign capacity, clothing us with full, and complete and absolute proprietary rights in the streets for our railroad, subject to our obtaining the consent of the abutting owners and the local

authorities, and that no one under any subsequent act or by any subsequent legislation should be allowed to come in and try to get consents and slip in ahead of us. What mockery it would be for a great sovereign people, to hold out an inducement for honest investors, challenged by inducements and advertisements to come in and carry out a system of public service, and tell them if they do they shall have the exclusive right of the enjoyment of those privileges and then turn around and pass legislation that allows a stranger, an interloper, a franchise jumper to take the franchise secured by them from the people. What sort of a sovereign is that? How does it comport with the dignity of a great sovereign people to break with its own faith and cheat and defraud subjects and citizens by passing an act like this act of 1884, after we have paid for our charter rights and our privileges! And therefore it was when these people attempted to avail themselves of the provisions of that act and slip into our shoes and get the consent of the Common Council and strip us out of one route and another and tear the whole system to pieces, we arose and demanded these injunctions and fought with all our desperation. We knew what our right was. We obtained our injunction against the Second Avenue Railroad which the Assistant Corporation Counsel, Mr Wickes, is so anxious to know about, in the Supreme Court, and we argued it at the General Term and we unfolded all this question. I have heard Mr. Evarts make great arguments, but I never heard him on any great occasion surpass the effort that he made in discussing our absolute charter rights, and the duty of the sovereign and the sovereign's justices to come in and protect us on this contract made with us.

Now, after that argument was heard and the appeal withdrawn, the Court, fully possessed of all these questions, appointed this Commission.

I had something further that I wanted to say, to illustrate and elucidate our great right. They talk of us as adventurers. We are not adventurers. These (Mayor's) Commissioners put forth their subscription paper and invited the people of all the world to come in and subscribe in a corporation created with certain powers to render public services; we came in; we got a right by it; after we got our right, the horse-railroad people and the franchise-hunters

obtained the act of 1884 in its present form, so that they might get what we had contracted for and paid for and had a right to ; and I say to my friend Trull who comes here to talk about his client's right to their railroads on Forty-second street and elsewhere over our routes, that he got his rights under the act of 1884 subsequent to the accrument of our right over those routes, and that his right

“ Compared with mine
Is as moonlight unto sunlight,
And as water unto wine.”

You and all the world must look at us as having a crowning claim on your confidence and conscience ; you must not look upon us as adventurers ; and when these opposing parties come before you to secure, by our discomfiture here, a franchise to which we have at least the *first* right, you must look upon us as holding that right clothed with the sovereign's recommendation ; clothed with the indorsement of the Court that had heard our whole case before they appointed you. And the Court has shown sympathy with us in keeping off from our routes these people, these horse-railroad and franchise-jumping vendetti that are trying to get what is ours. Such people to come here and try to commend themselves to your consideration as against us, by an assault upon our right, are too intolerable to endure ! I want you to know who we are, Messrs. Honorable Commissioners, and understand our right and claim. I understand these horse railroads and franchise jumpers are opposing us and trying to get what we already have from the State. They are trying to get it through Boards of Aldermen, and through traffic, and trickery, and to keep up the war on us until we shall be exhausted. But we are bound to due diligence and we must always be diligent ; and we have always been.

Now to clear up the only remaining question that I care to discuss on the subject of our origin, I will allude to the personnel of the Mayor's Commission. I yesterday showed your Honors there was no undue haste ; no improvident action on the part of the Commissioners ; that they did not hasten their work, but accomplished it on time and did as prescribed by the statute. Remark has been made here that really you should not give a very great

deal of weight to the determination of those Commissioners, for the reason, they say, that only three out of eight Commissioners have approved of this system of roads. Now, when these horse-railroad people discovered the powers that lay in that Rapid Transit Act, that the Mayor's Commission really had power to lay out routes and fix that exclusive power, they manifested frantic rage. The newspapers commenced to howl; the music ran along the whole line; public opinion was invoked; the Legislature was besieged; every effort was made to stop that Commission and its work, and it involved the Mayor who appointed it, as he supposed, politically, and Mayor Edson desired, at a very late stage in the proceedings of the Commission to reconstitute it of gentlemen who were his personal friends, whose reputation among his friends would be an assurance that there had been no wrong or improper working—a mere matter for his own protection. He suggested three gentlemen. One is the present Collector of the Port, Mr. Hedden, another was Mr. Randolph, the President of the Continental Bank, and the other was Mr. Devoe, President of the Mount Morris Bank. All strong men. They were appointed on the 31st day of March, 1884, and took office on the 2d day of April. At that time these periods of statutory performance to which I have referred, 30, 60, 90, 120 days had elapsed. At that time Articles of Association had been unanimously passed, and were a part of the fixed proceedings of the Commissioners. On the 4th day of April, that is two days after their appointment, they were called upon to reconsider those articles and re-vote on them, so that they would have an opportunity to comply with the requests of the Mayor.

Now, what could three fresh gentlemen put upon a Commission do in two days? Here were questions in which were involved the talent of engineers, statistical information, visits to Chicago, thousands of dollars expenses, a transfer system, and all these great questions, not one of which they probably understood, but it looked to them very large that there should be twenty-nine routes given to one corporation, *and that seemed to be and was their main doubt*. They said they would not have given so large a number of routes to any one corporation if they had been the original Commissioners. That is their doubt. They would exclude some

routes and they would give them to another corporation. You know, after the discussions we have had, that the larger the number of routes in one corporation the less the monopoly by this transfer system. You know the larger the mileage the less the monopoly under this transfer system. You know it would be a great deal better if all the railroads in this city were under one corporate control; then, instead of having ten or fifteen different lines, all charging their five-cent fare, this transfer system would be doing the public service required without charging additional fares. You know it. These fresh Commissioners did not, and there was no opportunity to tell them and make it plain in the closing moments of the Commission. General Viele was not before them; they were taken into a back room and the Articles of Association presented to them, and they said it looks quite large to us, and they got their lawyer to draw them up a qualified letter which they put upon record and then voted AYE. Their assent or dissent really amounted to nothing. They thought the scheme looked large; they did not know the scheme of the system. They have never pretended that they did, and it is impossible to suppose they could. You've been five months in trying to get at it. You were staggered at first blush by its magnitude. What could you have done in two days on such a theme? The education of five months has put you in a reasonable appreciation of it.

Two days were not sufficient for fresh men to grasp this whole system. The work was perfunctory and nothing else. But yet they saw enough of the system to know that it was too valuable to be lost—that its great features ought to be preserved, but they preferred two corporations instead of one for these vast public services. And what would be the result of having two corporations instead of one? It would be just twice the fares and double the collection from the pockets of the people that one transfer system makes. That is the full history of this branch of the case.

I meet these fresh Commissioners almost every day, and they all express regrets that they did not see the system in the light their associates and predecessors saw it, and in the light I think you see it.

Now, the testimony in this case, if my friends are inclined to

dispute this statement, will be found on the pages which I have marked in this book I hold in my hand, and if your Honors will take down the citation from page 391, page 424, pages 492 and 497, you will find all my averments verities.

I read from these pages of the Cable Rapid Transit Commission. That is the report of the Commission in which these fresh Commissioners joined. It was unanimous. That ends all this stuff and nonsense about only three out of eight Commissioners, so much dwelt on.

The fresh Commissioners thought there was too much power in one corporation, not knowing that the larger the power in one corporation the smaller it was as a monopoly, and the more beneficent in its operation. If there had been three or four corporations the people would have to pay triple or quadruple fares. But, notwithstanding, the advantages of the system were so overwhelming that they indorsed it.

Now, I wish to make some observations upon Mr. Wickes' testimony and position. As he is not here at this moment and has notified me that he would be detained by other engagements for the day, I will simply say that I cannot withdraw, on careful reflection, any criticism, or mitigate the severity of any criticism that I have made upon his testimony or upon his position. It is painful for me to be obliged to say that every attempt at explanation has only involved him deeper and deeper in the mire; and he put the crowning cap of infamy upon his official head when the Chairman of this Commission asked him, the other day: "If you had been instructed by the Mayor and the officers of the city to come here and favor this road, would you have come?" He was silent, and then, again, the Chairman put the question to him and he was silent. Then said the Chairman, "But Mr. Wickes, I am asking you if you had been instructed by the City authorities to come here and favor this road, would you have done so?" and he said "No." His is a voluntary appearance, and he came with the fell purpose to oppose this road and their counsel; and all this opposition have whipped out maps made at the Department of Public Works, and the printed documents of their entire case paid for out of the City Treasury.

The CHAIRMAN—I think you have misquoted Mr. Wickes. My recollection is not——

Mr. SHAW—I should be glad to be corrected.

The CHAIRMAN—My language was, “Supposing the Mayor and the other heads of Departments, at whose request he appeared here, had requested him to go to Chicago to obtain testimony in favor of the cable system, if he would have felt it in his line of duty to do so?” and he said he would.

Mr. SHAW—I distinctly understood him to be asked, if he had been requested by the Mayor and the other heads of the departments to come here and favor this road, would he have done so, and after some hesitation he answered no.

The CHAIRMAN—It is not material.

Mr. SHAW—I think it is material.

The benefit of that testimony is the legacy, and I hope the only legacy my friends in the opposition will have from the Counsel to the Corporation. Now, we know all about that testimony. I have commented on it already. We know what confidence to place in Mr. Sterling. He said that he got on a cable car in Chicago, and he was thrown violently forward and backward. He staggered us a great deal more by that statement than he could have been staggered by the motion of the car. Anybody who rides on the cars on the Brooklyn Bridge understands that. It is a delightful method of transit, and Mr. McKay’s testimony as to the deserted village of the plain and a few characteristics of that sort settles the matter.

The CHAIRMAN—The Commissioners feel that they have got a right in reaching a conclusion on this subject to be guided, to some extent, by their own personal observations. I shall very likely myself inspect this Chicago system very much more fully than I have heretofore. But if I should do that, it would certainly appear in any report that I might make just what I have done. It was objected early in the proceedings that the Commissioners would have no right to go to Chicago. I think I have the

right. If I err in that respect either the petitioners or the objectors will have the benefit of whatever I do. I state openly and above board what I propose to do ; and whatever I do will not be done in the dark or clandestinely. I must say in passing, I am not stating the sentiments of my associates. I am speaking for myself alone.

Mr. SHAW—The fact will further appear that Mr. Scribner, who is either Achilles or Agamemnon of this opposition—I don't know how Mr. Trull and himself divide the honors of the Epic founded upon the romances of Mr. McKay's witnesses—expressed a desire that the Commissioners should go to Chicago ; and I don't think there is anybody to object ; and I hope that in any report that the Commissioners write——

The CHAIRMAN—That fact will appear of record whether we have or have not.

Mr. SHAW—I pass by all Mr. Wickes' mass of testimony and reach the remaining objections which are now made before this Rapid Transit Commission. They say to us that the cable railways are an experiment. We know that they are in successful operation in San Francisco and Chicago. I hold in my hand a London newspaper containing an account of the opening of the Highgate Hill Tramway by the Lord Mayor of London and the Aldermen. The day was very fine, and thousands of spectators who saw the operation of the cars were quite enthusiastic. The London *Times* devoted three or four columns to it, and the paper that I have in my hand has seven columns in regard to it. This paper is dated May 21, 1884.

The CHAIRMAN—Was that the cable traction ?

Mr. SHAW—Yes, sir. It is about two and a half miles long, and it is a very narrow street, and there is a very heavy grade. I want to call your attention to the fact that the Lord Mayor and Members of Parliament, and the city authorities, attended in great state ; speeches were made, and it was a great day.

Mr. TRAPHAGEN—The Lord Mayor here don't take so much interest in the cable system.

(Extract from London newspaper read).

Mr. SHAW—I don't know but I ought to acquit Mr. Wickes of all blame in this matter, and saddle it upon that man who is riding into a cheap and nasty fame on the back of the "Dolphin," who seems to be still the master spirit of that Corporation Counsel's office, notwithstanding he is managing the Navy Department. I might as well be understood that this last grid-iron arrangement which I have exposed, wherein Whitney, Widner, Kemble and Jacob Sharp are seeking to take forty odd miles of our road, clearly shows the manipulator's hand; and I have no doubt that Mr. Wickes said "no," and I have no doubt why he said "no." He did not care about the order of the Mayor or the Commissioner of Public Works, or the head of the Fire Department; but the legacy that William C. Whitney has left for his successors in that great office of Corporation Counsel, is to do what he personally, for his own private uses, requires to be done.

Now I have here an Australian paper—a Melbourne paper. It is dated June 20, 1885. It shows that cable roads are in such favor there that the corporate authorities indorse their bonds and promote their construction. (Extract read).

Now, we have a cable road in successful operation in Philadelphia.

The CHAIRMAN—Is the road in Philadelphia constructed on the same general plan as that in Chicago?

Mr. SHAW—Yes, sir. They have changed their grip and have now got ours, and it is working very finely. In Kansas City they have built a cable road. They are operating it very successfully. They have attempted to evade the Hallidie patents, and they got into trouble. They are, however, running their cars very successfully, and doing a tremendous business. You have seen the cable road on the Bridge; and they are building one on Tenth avenue.

The CHAIRMAN—Is it claimed that it is built on the same plan as the Chicago system?

Mr. SHAW—It is built on our plan. The grip is ours. They have infringed it, and we have sued them.

The CHAIRMAN—Are they building it on the same plan as relates to the slot?

Mr. SHAW—Yes, sir.

The CHAIRMAN—They find the slot in Philadelphia to widen from one to one and three-quarter inches.

Mr. SHAW—They are using what is called Bonzano's tube. In order to make cheaper work and shallower excavations, they adopted in Philadelphia this Bonzano tube, and that is, of course, not so substantial, and does compress, and that has been their difficulty in Philadelphia.

The CHAIRMAN—Is this road in Chicago built of cast-iron yokes and masonry?

Mr. SHAW—Yes, sir.

The CHAIRMAN—The question arose in my mind under this system if the slots should be liable to open so wide, it would be very defective. It seems to me some mechanical arrangement ought to overcome this difficulty.

Mr. SHAW—Any attempt thus far made with tubes has been a failure. We are to use trenches and they give a firm slot.

The CHAIRMAN—The affidavit of some party states that he found on certain sections of the road in Chicago, which he mentions specifically, that the width of the slot is so wide that it would undoubtedly be very dangerous.

Mr. SHAW—That is Crowley's evidence. It might occur that the cable got out of gear. Horse cars often jump the track and delays follow. I don't suppose that indicts the horse-railroad system. The situation of Chicago is very peculiar. It is built on a swamp, and the masonry work may not have been cemented or piled sufficiently.

Now, I have here an article from a Philadelphia paper, which I will read.

(Extract read).

Thus you see the cable road is in very successful operation in Philadelphia, though they are using iron tubes there instead of trenches. We do not, as you know, take much stock in these iron tubes in place of trenches. I have also here a description in the *St. Louis Republican* of a cable road in St. Louis and in Kansas City. I won't read it, but it shows the high appreciation held for cable roads. They are building one in Cincinnati. I have sent some copies of the *Commercial Gazette*, containing an account of it, to the Commissioners.

I have also here a newspaper from Dunedin, the principal city of New Zealand, from which I read.

(Extract read).

Thus you see the New Zealander, Macaulay's New Zealander, has put cable roads in successful operation in that quarter of the globe. They seem to be going everywhere, circling the globe, and greeting, if I may borrow inspiration from the famous sentence of Daniel Webster, "the rising sun at every hour of his course."

Now, after eleven years of successful operation in San Francisco, is it not preposterous to say that the cable road is an experiment? The cable road is now being introduced, as Mr. Hallidie tells us, in Bristol, in Manchester, in Glasgow and in Edinburgh. It was said when the cable road was built in San Francisco, it is a very good road to go up hill, but it would never do on a level. That was the objection urged against the cable road—that it could be operated successfully only for going up hills and hilly streets. The San Francisco horse-railroad companies fought the cable system for years and years on that ground alone; and they argued that it could not be operated on an approximately level street, with just as much tenacity as does my friend on the right; that it is impracticable on narrow streets; that it would only do for the hilly and not for the level part of the city. At last they got it on the level portion, and it worked better on the level portion than on the hills. Then it was taken to Chicago to be placed on its level reaches of streets, and the objection followed it to Chicago; and Mr. Holmes tells us that the greatest difficulty that his corporation experienced was

because it was asserted that a cable road on a level plain was an experiment. Well, the experiment has proved an immense success.

We now meet the objection here in New York, that it is a very good thing for wide level streets, such as are characteristic of Chicago, but not for the narrower ones of New York. Look for a moment at this objection. Does it occupy any more space than the horse-car system? Are not cable tracks as inflexible and rigid as horse-car tracks? Is there more, as in case of horse-cars, than fourteen feet seven inches when two cars are standing on the track side by side, from the outer projection of one car to the outer projection of the other? No! Is a cable-car as easily managed as a horse-car? All the proofs before you worth considering declare it far easier. The wonderful mechanism of that grip is like your hand. It can grasp and relax and is as sensitive to the pressure of the hand as quicksilver. So that its movement can be controlled more absolutely than the movement of the horse-cars. The rest of the testimony, Mr. Cox, Mr. Holmes, Mr. Hallidie, Mr. Shinn, Mr. Endres and General Viele, show that wherever a horse-car can go cable-cars can go. The narrowness of the street is not a special objection to a cable road. The objection of the narrowness of the street would be to any road whatever.

The CHAIRMAN—That is what they have urged.

Mr. SHAW—Then why have they filed for horse-roads on our routes in narrow streets? They have said that the use of cable-cars is attended with a great deal of danger. Mr. Holmes' testimony is clear, and he says there are fewer accidents on the ten miles of his cable-road in Chicago, which carries three-quarters of his passengers, than on the other forty miles of his road where horses are used. Cable-cars can be glided through crowds because they are so easily managed. One of the best illustrations was given to me by a gentleman whom I asked to look at the road in Chicago. It was at the time of the Democratic Convention that nominated President Cleveland. The crowd extended over the track near the Palmer House. I asked him, on his return, "What did you find out about the cable-road?"

"Why," said he, "the car will go a mile in five hours: yes, it will go a mile in ten hours if necessary." I asked him what he meant. Then he explained that 50,000 people, densely packed, stood over and around the track of that road, and by the operation of that grip, that wonderful piece of mechanism, the car moved so slowly on that the people fell aside unharmed. No horse-car could have gone through that great crowd. Why the cable-car was one of the crowd, it moved, as the Chairman, Mr. Livermore, of the Mayor's Cable Commission said, in sympathy with it. We can go into any street where a horse-car can go, and we will occupy less space than a horse-car, for horses do no work to carry passengers except to drag the car. But the grip-car not only furnishes the locomotion, but it accommodates passengers; and the grip-car and the car attached are hardly longer than a horse-car with its horses. Now, supposing the cable road had been built upon Broadway, where a majority of the property-owners consented that it might go, and it were operating there to-day, they would be carrying two and three cars in a train and doing the business with perfect and decorous safety. The horse-cars at present can hardly stop for a passenger because there is not time enough to let passengers get on and off, because they cannot operate a brake on a horse-car to arrest even the speed or will of horses; but on the cable-cars they have in their grip-car a powerful brake which they can handle with the utmost expedition, and with the greatest force when they want to, and obedient steam has no will of its own like a horse, but instantly responds to the touch of the engineer.

Now, Peter Cooper argued in favor of the cable roads before the Mayor's Elevated Commission. You will find a note of it in the report of their proceedings. It was fairly a craze of the great philanthropist's life to have cable railways in lieu of horse railways; and that act of 1866 alluded to by Mr. Cozans, is known as Peter Cooper's act, and it was to enable the construction of cable railways here.

I hold here in my hand the report of the convention of the American Street Railway Association. It was held in Chicago in 1884, and the subject presented to the convention was the Report of the Committee on Transportation, signed by A. S. Johnson and

William Richardson. Mr. Richardson is the foremost horse-rail-road man in this country and perhaps in the world.

(Extract read.)

The convention adopted that report that the cable system ought to be substituted for the horse system. The horse-railroad men say so themselves. Mr. Richardson himself, no longer than last year, read a paper before the Constitutional Club in Brooklyn, in which he declares that the very thing of all others for street railway transit was the cable system, and into that paper he incorporates with pride the report from which I have just read. He is probably the greatest living authority on street railroads after Mr. Holmes—probably greater than Mr. Holmes, for he has built railroads in this city and Brooklyn under a great variety of conditions as to topography and varying width of streets. This variety of conditions is not so great in Chicago. But there I give you his indorsement of the system.

Now, what is Mr. Henry Hart, of the Third Avenue Railroad Company, the most important surface horse-road in this city, doing with five miles of cable road as an experiment? Is it not perfectly preposterous, the statement that Mr. Henry Hart, with his notorious propensity to never risk anything, to say that he is spending a million dollars as an experiment? He has experimented in this way. He knows cable roads are a success. He is the last man that would experiment. The fact that he has put the money of his corporation into this system sufficiently indicates that. They tell me, he counts the nickels collected during the day every night, and spends half the night doing it before he would spare one farthing to repair an old tie or an old rail. For long after steel rails had become used he kept his old iron rails on Third avenue; and to-day it is largely iron, and is the roughest and the most indecent, and the worst appointed road there is in the city. His parsimony or for euphemism, I say his economy, proves that cable roads are not an experiment. Would such a man as that throw broadcast a million dollars to build five miles of road in a sparsely settled portion of the city, as an experiment? It is preposterous.

There is Henry Hart. I don't love him much, and I don't

know who does, unless it be the great adversary of mankind. The Jew of the Rialto. His counsel comes here and acknowledges his intrinsic meanness. Old Shylock was a prince of liberality compared with him. I incur no risk in denouncing him as thoroughly and absolutely abominable. Shylock could hate and was ready to pay for his hatred; but Henry Hart loves money with such miser-greed, that with his millions at command he won't resent, if it costs him a penny, any expression, however much it could or might offend any other mortal being's pride, fanaticism, religion, superstition or fear. This is the man that is spending one million dollars to build a cable road in the *terra incognita* portions of our island! Do you think, now, that cable roads are an unfeasible and experimental thing?

Now Mr. Bergh has said that it would be an inestimable boon to this city if this cable system could be adopted. He intimates but one objection. He gives us some startling figures as to its need. His statement will be found, if the Commissioners please, in the affidavit of Professor Cox. He suggests only one doubt, and he says he is afraid that the slot might interfere with hoofs of horses. But Mr. Hallidie told us there was nothing of that sort known in San Francisco. Mr. Holmes says the objection is fanciful, and that is all we have to say about it; and there is no proof in any quarter, except such observations as Sterling may have put into the mouths of witnesses in the affidavits obtained by him.

Now, to say that such a system is an experiment is preposterous. It is in Australia; it is in England; it is in New Zealand; it is in all the principal cities of our continent. The stars that gem the Dipper and sentinel the North Pole, and the stars that gem the Southern Cross and sentinel the South Pole have, during the last decade, looked down upon cable roads in successful operation, on both sides of the equator. And such a system is called an experiment!

Well, if it be an experiment, all the progress in the arts is experiment; all the inventions by which humanity has been ameliorated or glorified are experiments, and will remain experiments—

“Until the sun grows cold,
And the stars grow old,
And the leaves of the judgment-book unfold.”

Sterling says that he staggered and was violently thrown on the Chicago Cable Road ! He absolutely lies, and this Commission knows he lies. All the world in our city that have watched the operation of the Brooklyn Bridge Cable Road, which is but a cable road, knows he lies. And when Macaulay's New Zealander, fresh from Dunedin, its capital city, takes his lonely stand on that bridge to sketch the ruins of the Statue of Liberty Enlightening the World, now being erected in our harbor, he will say he lies.

But objectors say it will interfere with the sewers. I am not good at the blackboard, so often used here. Its chalk and its black surface, so inviting to all who have addressed you, furnish me with no matter for argument. I shall trust to verbal diagram rather than one drawn with chalk on that board. Do you know that the cable, which is the propelling power of cable roads, lies close under the pavement, very near to the surface of the street ? The grip attaches to that cable and lies as near the surface as the rails on the road-bed of a surface horse road do. Just right under the pavement. Now, that cable is operated on sheaves or pulleys ; and those pulleys, in order to give the cable its proper slackness, are placed at a distance of thirty-five or forty feet apart. They do not want a perfect cable tension, so it is not necessary the trench should be continuous. You use so much trench as is necessary, and if you encounter an obstacle near the surface, why all that you have to do is to let your cable pass over it. So, if a sewer be fifteen feet across, all that you have got to do is to have your trench terminate at each side of the sewer, and let your cable go over. There is no sewer or pipe or drain that is of a greater diameter than ten or twelve feet, *or nearer the surface than three feet*, and these sheaves are placed at a distance of thirty-five feet apart. That meets the question that Mr. Wheeler presented without the necessity of any involved mechanical contrivance.

Now, on the subject of health, I will simply make this observation : all the evidence in the case against us would apply to the excavation of the soil anywhere on earth. The very plowing and subsoiling and tilling of our farmers would produce the same consequences that are alleged to follow from the upturning of this soil. So that when we say " they tickle mother earth and

she smiles with her harvest," according to the testimony of these doctors before us, she produces the noisome air of pestilence! Now, the whole argument on that question would apply to digging a hole anywhere. I do not think much of that testimony or the argument. The testimony was gotten up by the power of Jay Gould and the Western Union people to influence the Legislature to repeal the law requiring them to put their telegraph wires under ground, and having been gotten up and ready at hand it was brought here and *mutatis mutandis*, was made applicable to this case. It was already prepared and fitted to this situation when Mr. Wickes' masters told him that he must oppose this road.

I won't hint that Jay Gould and William C. Whitney are working the same groove in this matter. Both are notoriously inveterate speculators. Does this explain how the testimony in one case and the other came from the office of the Counsel to the Corporation? I hope not. But men of both meaner and larger perceptions than mine may think otherwise. Let that pass. I have no warrant to make an insinuation on the subject, and I do not.

Now, who has assailed this cable system? Take the City of New York, with all its resources, all its railroad combination, and they have not been able to produce a respectable engineer to belittle or disparage or criticise the cable railway system. The only engineer they have produced with all their resources—the only man they could induce to enter their service was this man Crowley. In this city, full of capable engineers with full means of examination, whom have they brought here but this boarding-house bilker Crowley and McKay, detailed from the office of Public Works. Mr. Bostwick and Mr. Webster are not mechanical engineers, they only deal with the disturbance of the sewers, and I have shown that we never shall have occasion to disturb those sewers. So that all the expert evidence in this case against the cable, or criticising it, declaring it is an experiment or otherwise, is the testimony of that man Crowley and this man McKay, while, on the other hand, we have produced Hallidie, Holmes, Viele, Shinn, Boller, Endres and North. What an array of engineering talent, probably the finest in the world, *versus* — Crowley impleaded with McKay!

Who wants these cables ? Mr. Earle's affidavits disclose to you that the people want them. At the time he made his affidavit there were 60,000 signers ; I have a petition here, which Mr. Earle refers to in his affidavit, signed by 70,000, signed by their own hands, asking for the cable system as it is laid out upon our maps, and as we are asking for it here. I admit we paid five cents a name to the canvassers to get it. Can you expect your business to be done without paying for it ? It was a method we took for paying our canvassers and securing good work. They were selected men and women, whose oath would be taken in any court of justice any day, anywhere ; men and women whom you know, or might not feel dishonored to know ; men like Charles Gildersleeve ; men taken from medical colleges, and students ; men recommended to us by good people who knew them. Ladies from the Normal College, and other women good and true. They circulated this petition ; they went into factories, and they obtained signatures, and they are in the handwriting of the persons who made them. The canvassers returned their work, and swore that they saw the signature made by the party who professed to own the name. In this appeal to the Commissioners, we hear the tender voice of woman. They come here and ask you to give them this system, as a transfer system, as a means of economy, as an addition to their income and an increment of wages to them. I regret that I cannot speak of all the ladies that came to speak for their sex, but I, in common with all who admire Hypatia, must lay, as you must lay, the homage of your respect at the feet of Mrs. Dr. Lozier. Now, against all that, what do we have ? We have for it Mrs. Dr. Lozier, Miss Janness and Mrs. Cobb *versus* Mrs. Twitchell. That is the situation ; and the contrast between our list of engineers and Crowley ; and the contrast between our lady petitioners for this system and Mrs. Twitchell represents the merits of our case and the demerits of our adversaries. I wish to say further on this subject, that the public invited this system and desired to have it. The original rapid transit petition to the Mayor was signed by 116 of our leading citizens. And the first on the list was that merchant prince, H. B. Claflin. There were some three hundred million dollars represented among those names. And of those people

who petitioned for this cable system and took their oath that they desired it, more than 60 of them, including Mr. Claflin, have overlooked the work of the Mayor's Commission, and have approved of it, and are now asking that it should be approved.

Now, the last topic that I care to discuss is this: We have given you a system; we ask you to return it to us with your approval complete and unmangled. I speak with all the fervor of him who wrote:

“ Woodman spare that tree,
Touch not a single bough.”

We have given you a perfect system, as we think, as near as it can be. Do not return to us a partial route, nor with any part broken off or any limb lopped off. Let us have this most perfect system in its completeness and entirety. A suggestion has been made that we ought not to go below the Brooklyn Bridge. Why should you refuse us a complete system to the Battery? Don't people want to be delivered in Wall street? There is some narrowness, I admit, in William street, but William street is a dead street; the owls and the bats are there now. It is used for the storage of gross things; there is an air of decay about it. It is Rotten Row of the city. Such a Rotten Row is found in all cities, for every city has its Rotten Row, and William street is our Rotten Row. It has had its day of glory, but it is gone. There is room for this road through that street. The narrowest point is nineteen feet eight inches; its average is about twenty-two feet, and if you put two tracks there, and the cars should be on them side by side, the distance from the outside of one car to the outside of the other would be fourteen feet seven inches; but the coincidence of the meeting of two cars stopping at the same time is not likely to happen very often. The impediment to the traffic they have on the street now would be that of one track and one car at a time. Then if you do that and extend our facilities into Wall street, through Broad down to the Battery, you will give us a route from the Harlem river to the Battery; and in that case William street will immediately assume the character of an office street like Lombard street in London, which is no wider, and which is one of the most com-

pact and beautifully built streets in the City of London. But it will be used for an office street, and I have no doubt the appreciation of property will be enormous. I have no doubt it will be the making and the saving of the street.

The same arguments may apply to Cortlandt street and Liberty street. They lie between two rivers. Brooklyn, with a population of 800,000 and Jersey City 200,000, with Newark's 250,000 population hard by, are incessantly pouring across the lower part of the city. They go and pass, and pass and go, in swift and multitudinous processions across the lower end of our island, from ferry to ferry, like a weaver's shuttle. They need these facilities.

Now, I am saving a great deal of argument by putting to you the issues in this shape. If you do not give us this complete system, some one else will have the portion of it you lop off. For it is as certain as night follows the day, if you deprive us of these down-town routes, you simply hand over that part of our system to another—perhaps to several others. Those routes have already been filed on by horse-railroad people; the notices are now being published in the papers. I have got to get out another injunction to stop them from applying for consent from the local authorities. It is a fore-doomed, fore-ordained, fore-fixed thing that if we do not have it somebody else, several bodies, will. By taking it from us and giving it to somebody else, people will have to pay extra fares; if it is left to our system there is no extra fare. Why will you make people pay additional fares by taking this out of our system and allowing independent roads to fall into other hands? I think that sums up all that is to be said on that subject. Whatever may have been the inclination of the Commissioners heretofore on the subject of these down-town routes, when they were filed on by Ed. Karney and Dan. Conover's corporations with Col. Wagstaff following behind, to defeat our application here and get those routes and cut them off from our Main Route No. 1. I see a design in all this work. They have made opposition to this route in order that they might get other routes themselves. But they have unfolded their hand too soon.

And whatever may have been the opinion of the Commis-

sioners on these down-town routes before, it is so clear and patent that without a positive injury to the people, without compelling them to pay an increased fare, with poorer facilities, you cannot take them from our system. I say we give you in Route No. 1, a perfect route from the Harlem river to the Battery. Do not return to us a mangled form; do not hand over to us a *torso* broken in any part.

And so it is with reference to all our cross-town routes. It has been said that we maliciously paralleled Twenty-third street, and did the same thing in Fourteenth and Broome streets. It is the case of the snake's egg in the eagle's nest. We did not maliciously parallel those routes. We proposed a system on axial lines on the east and the west sides of the city, with transfer tickets; and in order to give free rides, for that is practically what it means, we had to have cross-town roads. It would never have done for us to drop our passengers at Twenty-third street and transfer them to Mr. Sharp's horse cars to pay him an additional fare. We were bound, in order to make our system the beneficent thing that we claimed for it, that we should have cross-town routes without additional charge. Lop them off if you must, they are scarcely feeders to us; they won't put any revenue into our pockets; but the system requires for its completion that you should have facilities of cross-town traffic *from* axial lines, and that they should be connected, and that a single fare should carry a passenger to his destination over them. We put a cross-town line in Forty-second street, because it is a good street. It was needful for that street, and we intend to keep it there if we can get the sanction and approval of this Commission to the scheme in its entirety. Supposing you take it out, what is the result? You make our passengers, when they get off from our axial lines east or west, pay an additional fare of five cents to Mr. Conover's road. Is it a fair imposition to put upon those passengers? Certainly not. You are legislating against the people, if in any way, shape or form, you require our passengers to be transferred, to avail themselves of separate and independent horse-railroad lines when you can give connection with our system. The system that Gen. Viele laid out, the very beauty and harmony of the system, lies in that transfer facility,

and to take it away from us and from the people is to make the people pay additional fares.

Now, some criticism has been made upon the number of our routes. That I care not further to answer. I may again and again refer to it before I finish ; for I am proud of it. The laying out of our routes and that we are crossing prohibited streets, I will just notice in conclusion. Our system, consisting as it does of two axial lines, with these cross-town lines, crosses a longitudinal line of streets, which may be called prohibited streets ; for example, Broadway and Fifth avenue. Our system presents the appearance of two combs, whose backs respectively are on the east side and west side of the city and whose teeth, as representing cross-town lines, approach to, but cannot cross, these prohibited streets.

Well, there are my combs, and there are their teeth. I think the public will find it a matter of regret that these teeth cannot be brought together—there is a legal lock-jaw that keeps them apart—for if they could be brought together, why then the transit across the island from river to river, from ferry to ferry, would be complete.

If, however, this lockjaw can't be alleviated, the service will be quite desirable and the facilities proposed without that alleviation would be useful and desirable, for we then can deliver our passengers from our axial lines to the central part of the city. We could carry the people up to either side ; but of course it would be a more desirable service if we could transfer them across the line of these prohibited streets, but we should have to stipulate that our passengers would have to walk across the street and take the car on the other side. But the lines would be quite completed if we could cross Fifth avenue and Broadway.

If the back of our combs, in consequence of legal impediments, can't project their teeth across these prohibited streets, why then we must wait till those impediments are removed and then we can give a more thoroughly desirable service. The public need will settle that with the Legislature in short order after the people have walked a while.

Now, the Mayor's Commission knew very well that they could give a desirable service by laying out the routes just as they did, because they could carry their passengers from either side up to the

prohibited streets, and if the Legislature should enable them to go across the streets, then it would be an extremely desirable service. But it is very desirable in the form in which they have left it. Now they counted upon the Legislature to complete the system. *The Legislature has done so; that expectation is fulfilled.* Within ten or twelve days after the Articles of Association were adopted, the Legislature passed an act which enabled them to extend their roads and fill up these gaps and complete the system, and our corporation have taken the necessary steps to complete the system by going to the Common Council and asking their assent to their crossing the roads. We have filed for that extension. I have laid the proof of our application before you; and it is a part of your testimony, so that you suffer no embarrassment whatever.

The CHAIRMAN—What law do you refer to?

Mr. SHAW—The Act of 1884; by proceeding to confirm this thing in its present shape, because if the Board of Aldermen confirm your proceeding they will also confirm these extensions, so that it is certain that we will have them or we will have nothing from the Board of Aldermen. You take no risk in doing it. You are to consider the end in view, the performance of this public service in the extremely desirable form we present here. You need not stand on ceremony so long as statutes *in pari materia* enable you to complete your work. Do you not think it is a good thing to have these public services that we propose? We will take care of statutes in *pari materia*; those are questions which will be reached by the Court. You are to deal with the physical and economic aspects of this matter, irrespective of such legal technicalities or objections as have been offered. You are to tell us whether or not it is a good thing, all considerations taken into account, to have this system go into operation as a physical fact. Now I don't care whether you report before the Board of Aldermen reports or after. It makes no difference. If the Board of Aldermen report in our favor, they will report with these provisions in it. If the Board of Aldermen report against us, all this work is vain, and no harm can come from it.

I don't think there is any further question to discuss on the

merits or on the law of this case. I have nothing to do now but to express my thanks to the Commissioners for their patient hearing, and I hope that they will address themselves to a speedy completion of the work before them, so that we shall understand what their judgment is, and if it be in favor of the petitioner, we shall want to make an early application to the Court for the confirmation of the report. I hope the Commissioners will go to Chicago and see whether Mr. Holmes or Mr. Sterling speaks the truth, and I hope they will put in their bill of expenses, items for the petitioner to pay on the same basis that all expenses for this inquiry have to be paid.

Chairman PELTON—The Commissioners desire to express to the Counsel of both sides their obligations for the kindness and courtesy with which we have been personally treated and the general kindness and respect which has been manifested towards us. As we have previously intimated, the Commissioners will go to Chicago before deciding the questions before us.



After advisement, and after the Commissioners had visited Chicago to examine the merits of the cable system, they made the following report on the petitioner's application :

